Supreme Court, U.S.
FILED

(1) 96 852 NOV 2 2 1996

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EARL WITTMER, EARL CRAIG COX and JAMES JEFFERS,

Petitioners,

v.

HOWARD A. PETERS, III, and STEPHEN McEVERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
MARY LEE LEAHY
CHERYL R. JANSEN
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411

MARY LEE LEAHY
Counsel of Record
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the only form of race discrimination permitted by the Fourteenth Amendment to the United States Constitution discrimination that is narrowly tailored to remedy past race discrimination?

2. Does the Fourteenth Amendment to the United States Constitution permit race discrimination in employment decisions by a public employer when that employer has had no history of past race discrimination in employment?

3. If the Fourteenth Amendment to the United States Constitution permits race discrimination in employment decisions where there is no history of prior discrimination, are the appropriate standards permitting that race discrimination under the strict scrutiny test: 1) motivation by a truly powerful and worthy concern; 2) a racial measure that is a plainly apt response to that concern?

4. Did the Respondents violate the Petitioners' right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution when they promoted an African-American over Petitioners to the position of lieutenant at the Illinois Department of Corrections primarily because he was an African-American?

PARTIES TO THE PROCEEDING

The parties to the proceedings before this Court are:

Petitioners:

EARL WITTMER, EARL CRAIG COX and JAMES JEFFERS are employees of the Illinois Department of Corrections who applied for and were denied promotion to the position of lieutenant at the Department.

Respondents:

HOWARD A. PETERS, III, was Director of the Illinois Department of Corrections at the time the Petitioners were denied promotion to lieutenant.

STEPHEN McEVERS was the Warden at the Illinois Department of Corrections who made the decision not to promote the Petitioners to lieutenant.

There are no other parties to this action.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12

I.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY WHETHER OR NOT THE ONLY FORM OF RACE DISCRIMINATION PERMITTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS DISCRIMINATION THAT IS NARROWLY TAILORED TO REMEDY PRIOR RACE DISCRIMINATION 12

II.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI DUE TO THE VERY IMPORTANCE OF THIS AREA OF THE LAW 18

III.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO PREVENT NUMEROUS OTHER VIOLATIONS OF CONSTITUTIONAL RIGHTS 22

IV.

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER THE PETITIONERS' RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED IN THIS CASE 25

CONCLUSION 27

APPENDIX

A—Opinion of the United States Court of Appeals for the Seventh Circuit filed July 2, 1996 .... A-1

B—Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing With Suggestion for Rehearing *En Banc* filed August 27, 1996 ..... B-1

C—Judgment of the United States District Court for the Central District of Illinois entered on September 1, 1995 ..... C-1

D—Opinion of the United States District Court for the Central District of Illinois entered on August 31, 1995 ..... D-1

E—Opinion of the United States District Court for the Central District of Illinois entered on August 4, 1995 ..... E-1

TABLE OF AUTHORITIES

Cases Cited:	PAGE
Barhold v. Rodriguez, 836 F.2d 233 (2nd Cir. 1988)	15
Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993)	14
City of Richmond v. J.A. Croson, 488 U.S. 469 (1989)	12, 20
Cooper v. Aaron, 358 U.S. 1 (1958)	20, 21, 22
Detroit Police Officers Association v. Young, 608 F.2d 671 (6th Cir. 1979)	15
Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996)	16
Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991)	13, 20
Minnick v. California Dept. of Corrections, 157 Cal. Rptr. 260 (Cal. App. 1979)	15
Regents of University of California v. Bakke, 438 U.S. 265 (1978)	20, 23
Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981)	15
Wittmer v. Jeffers, 87 F.3d 916 (7th Cir. 1996)	1, 11, 12
Wittmer v. Jeffers, 904 F.Supp. 845 (C.D. Ill. 1995)	1, 11
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	16, 20

Constitutional Provisions Cited:

Fourteenth Amendment to the United States Constitution 2

Statutes Cited:

28 United States Code 1254 1
28 United States Code 1331 11
28 United States Code 1343 11
42 United States Code 1983 ..... 2, 11

The Petitioners, Earl Wittmer, Earl Craig Cox and James Jeffers, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on July 2, 1996.

OPINIONS BELOW

On July 2, 1996, the United States Court of Appeals for the Seventh Circuit issued its opinion in this case affirming the decision of the United States District Court but on different grounds. The Court of Appeals decision (A-1) is found at 87 F.3d 916 (7th Cir. 1996). The District Court decision (D-1) is found at 904 F.Supp. 845 (C.D. Ill. 1995).

STATEMENT OF JURISDICTION

On July 2, 1996, the Court of Appeals entered the judgment for which Petitioners seek the Writ of Certiorari. On July 24, 1996, the Court of Appeals granted Petitioners' Motion for Extension of Time until July 29, 1996, in which to file the petition for rehearing with suggestions for rehearing *en banc*. That petition for rehearing was filed on July 29, 1996.

On August 27, 1996, the Court of Appeals denied Petitioners' petition for rehearing with suggestions for rehearing *en banc*.

This Court has jurisdiction to review this case under 28 *U.S.C.* §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 *U.S.C.* §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Facts

In December, 1992, the Illinois Department of Corrections (DOC) posted ten vacant lieutenant positions at the soon to be opened Green County Impact Incarceration Center (boot camp).

The District Court found (and it is undisputed):

> The boot camp is a military-style correctional institution that is designed to instill responsibility, discipline, self-respect, and respect for authority in *nonviolent first-time offenders. Eligible offenders who are sentenced to up to eight years in a traditional institution may discharge their sentences by participating in and successfully completing a 120-180 day program.* Inmates at the boot camp are required to submit to an arduous schedule of paramilitary exercises, physical training, and hard labor; they also participate in intensive programs relating to education, drug treatment, prerelease preparation, and individual and group counseling. The boot camp employs an intense, highly structured, and regimented routine which, unlike traditional prison environments, requires the staff to be verbally aggressive and confrontational towards the inmates. African Americans comprise approximately 60% to 70% of the inmate population at the boot camp.
>
> The security staff at the boot camp consists of three captains, ten lieutenants, and forty-eight correctional officers. (C-5 - C-6) (emphasis added)

The lieutenant job posting required two years experience at a correctional institution.

Petitioners and others, including Gregory Hilliard, submitted their resumes as applications.

Four of the ten lieutenant positions at the boot camp were filled through the racially neutral Upward Mobility Program. Under that program applicants took a five hour written examination; there was no oral interview. Applicants who passed the examination were then ranked by seniority, correctional facility by correctional facility. If a lieutenant position became available at a correctional facility, the applicant from that facility who passed the examination and had the most seniority was put in that lieutenant position.

After four positions at the boot camp were filled through Upward Mobility[1] (one of the four selected was an African-American), six lieutenant positions were left to be filled by a ranking process.

The process which led to the ranking was as follows:

1. Applicants submitted their resumes.

2. Applicants took a physical agility test.

3. If they passed the physical agility test, they took a written test and a written examination. The information given in writing by the applicants regarding performance evaluation, attendance and discipline was checked against the actual DOC records regarding performance, attendance and discipline.

4. After the written test and examination each applicant was briefly interviewed. (That interview did not figure into the rankings.)

---

[1] The Upward Mobility List was for the DOC Correctional Center with which the boot camp was to be affiliated.

The applicants were then scored on the basis of experience, knowledge, skills, education, training, performance evaluations, attendance, supervisory skills and discipline records. The applicants were then ranked according to score.

In February of 1993, Respondent McEvers announced the six to be promoted to lieutenant through the ranking process, but he did not reveal the rankings. Hilliard, an African-American, was one of the six promoted to lieutenant through the ranking process. Petitioners, who were white, were not promoted.

At the end of February, Petitioner Cox received anonymous mail which contained the score sheets of the applicants. Petitioner Cox ranked third with a score of 13.55, Petitioner Jeffers ranked sixth with a score of 12.9 and Petitioner Wittmer ranked eighth with a score of 12.7. Hilliard ranked forty-second out of forty-six applicants with a score of 9.25.

At the time of ranking and announcement of selection, Hilliard had not worked in a correctional institution for two years as required by the job posting; he had been hired as a trainee on March 1, 1991.

Hilliard was one of two of the forty-six applicants with a *zero score* in the category of *supervisory* experience. Petitioners Cox and Jeffers each got a 2 rating for supervisory experience. Petitioner Wittmer got the highest possible rating in that category, a 3. The Petitioners consistently outscored Hilliard in all categories that led to the ranking.

Hilliard's last performance evaluation was simply "meets expectations." Petitioner Cox received three "exceeds expectations" on his last evaluation; the rest were

"meets expectations." The same was true of Petitioner Jeffers. His supervisor wrote of him:

> C/O[2] Jeffers is capable of advancement within the Department, with limitations only set by himself.

Petitioner Wittmer also received three "exceeds expectations" on his evaluation. His supervisor wrote:

> [his] prognosis with the Department is one of great outlook.

Respondent McEvers, Warden at the Jacksonville Correctional Center (with which the boot camp was affiliated), made the decision to promote Hilliard.[3] In a memo to Personnel, Respondent McEvers wrote that *a minimum of two of the thirteen supervisory positions* (three captains, ten lieutenants) *at the boot camp "should be filled with African-Americans to meet Affirmative Action goals."* (emphasis added)

During his Deposition, Respondent McEvers testified:

> Q If we go to the third paragraph of that memo, who determined that 2 of the 13 security supervisory positions (captain and lieutenant) should be filled by African-Americans to meet affirmative action goals?
>
> A I did.
>
> Q *How did you determine that*?

---

[2] C/O means correctional officer.

[3] On August 31, 1995, the District Court denied the Motion for Summary Judgment as to Respondent Peters, Director of DOC at the time of Respondent McEvers' decision, because, based on the evidence, a jury could conclude that as Director of the Department he had espoused a policy of considering race in employment decisions. (E-1, *et seq.*)

A *Boy, I don't know that. I can't answer that.*

Q Did anyone assist you in making that determination?

A No.

Q Did you look at any documents in arriving at that determination?

A Yes.

Q What did you look at?

A Affirmative Action Plan.

Q By that, are you referring to McEvers Exhibit 9?

A I don't know, yes.

Q Did anything in Exhibit Number 9 help you in making this determination that 2 out of 13 ought to be Afro-American?

A No.

Q Did you look at anything else in arriving at this determination, any other document in arriving at that determination that 2 out of the 13 should be Afro-American?

A Don't recall.

Q Did you talk with anyone?

A Maybe I can try to explain somewhat by saying when in looking at the overall picture of trying to put together staffing plan for this brand new facility to come on board and thought about a number of things, not the least of which was whether or not we were going to have any African-American supervisors. A number of things entered into plans considering I thought about different things at different times. I can't remember what they

> are. All were obviously—I know we thought about how we were going to try to have some African-American staff supervise, hopefully some African-American supervisory staff. *I arrived arbitrarily at the minimum two as minimum acceptable number.*
>
> Q Did you talk with anyone before you made the decision that it should be 2 out of the 13?
>
> A No.
>
> Q Didn't consult with affirmative action office of the department?
>
> A No.
>
> Q Prior to the memo of March 4 which is the second to the last page of McEvers Exhibit 2, had you advised anyone in the department that you had determined a minimum of 2 of the 13 should be Afro-American?
>
> A No.

(emphasis added)

The written Employment Decision Form, on which Respondent McEvers justified his selection of Hilliard, read in part:

> *Mr. Hilliard was selected primarily because he is African-American.* We endeavor to recruit and promote qualified minorities not only to meet affirmative action goals but also because the majority of our inmates are minorities. (emphasis added)

Since an African-American had been promoted to lieutenant through the racially neutral Upward Mobility Program, Hilliard was chosen to meet Respondent McEvers' quota of a minimum of two African-Americans in supervision. Respondent McEvers admitted he chose

Hilliard primarily because he was African-American. He did not know of any Caucasian chosen for promotion primarily because he was Caucasian.

The DOC Affirmative Action Plan for FY-93, which was in effect at the time Hilliard was selected, is irrelevant to this case because it sets affirmative action goals for hiring only. There was no Affirmative Action Plan for promotion or for the position of lieutenant. There was no Affirmative Action Plan correctional facility by correctional facility.[4] Richmond, DOC's Affirmative Action Officer, was not aware of any documents in DOC that would indicate the appropriate number of blacks to hold the position of lieutenant. Richmond thought DOC's policy was that race could be considered as a factor "in assessing comparably qualified candidates," but *that policy was not written down*.

Richmond was not aware of any particular criteria given to Wardens to guide them in how or when to take race into consideration in making employment decisions. Richmond could not recall discussing affirmative action at any meeting of Wardens. Richmond thought it would be advantageous to have more blacks than the appropriate employment utilization rate, but DOC had not determined the "correct number" of blacks.

The hiring system at DOC was racially neutral. There had been no adverse impact study nor any validation

---

[4] Statewide, the Affirmative Action Plan showed an over-utilization of African-Americans in the Protective Services job category (those serving as Correctional Officers, Sergeants, Lieutenants, etc.) but there was no document at DOC that indicated the race of each employee rank by rank in Protective Services.

study in regard to the promotion process at DOC for the position of lieutenant to determine if the promotion process had an adverse impact upon African-Americans and, if so, whether the promotion process was valid (job related).

Most DOC correctional facilities were geographically located in downstate Illinois where there were not many African-Americans in the local population. DOC has multi-culturalism training for its employees.

Respondents did not dispute that Hilliard was chosen due to his race. Respondents vigorously defended the consideration of race in employment decisions, not just at boot camps, but throughout the prison system in Illinois. Defendants relied on two experts, but, as the District Court noted, neither had experience with boot camps. (D-10, *infra*)

The Respondents claimed they could consider race in selecting Hilliard because:

1) The boot camp was an intense, confrontational program;

2) Sixty to seventy percent of the inmates were African-American;

3) There was disparity between the racial composition of the staff and the inmates;

4) There could be perceptions of unfairness on the part of the inmates;

5) A selection based on race could promote easing of racial tensions and further the efficient management of the boot camp.

Basis For Jurisdiction In The District Court

This cause arose under 42 *U.S.C.* §1983. The United States District Court for the Central District of Illinois had jurisdiction under 28 *U.S.C.* §§1331, 1343.

On August 31, 1995, the District Court found that the Petitioners' constitutional rights had been violated because the Respondents had not met their burden, under the strict scrutiny test, to justify the selection of an African-American as lieutenant due to his race. Among other factors, the District Court found that first time non-violent offenders who could reduce an eight year sentence to 120 to 180 days were likely to succeed at the boot camp without racial selection of employees. The District Court then entered Judgment for the Respondents on the grounds of qualified immunity. 904 F.Supp. 845 (C.D. Ill. 1995) (D-1, *et seq.*)[5]

The Court of Appeals affirmed the District Court's judgment on July 2, 1996, but on different grounds.[6] 87

---

[5] On October 20, 1995, the District Court denied Petitioners' motion for injunctive relief. On November 21, 1995, the District Court denied Petitioners' petition for attorney fees and costs on the grounds Petitioners had not prevailed. Due to the Court of Appeals holding in this case issues dealing with multiple Plaintiffs and appropriate relief, injunctive relief and attorney fees are not before this Court.

[6] Petitioners' counsel was asked about the separation of the races during racial violence at a prison during oral argument. Petitioners' attorney did say the races could be separated, but, upon reflection, counsel believes that may not be viewed as intentional discrimination. It is no different than separating the seventh and eight grade boys in a playground fight or Marines from Navy in a barroom brawl. Separation during violence is very different from intentional segregation of the

(continued...)

F.3d 916 (7th Cir. 1996) (A-1, *et seq.*) The Court of Appeals held that the Fourteenth Amendment to the United States Constitution permitted race discrimination where the discriminators were motivated by a truly powerful and worthy concern and if the racial measure adopted was a plainly apt response to that concern.

The Court of Appeals fully accepted the fact that the Illinois Department of Corrections had no history of prior race discrimination in its employment decisions and that Hilliard was promoted primarily because he was African-American.

The Court of Appeals denied Petitioners' petition for rehearing with suggestions for rehearing *en banc* on August 27, 1996. (B-1)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY WHETHER OR NOT THE ONLY FORM OF RACE DISCRIMINATION PERMITTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS DISCRIMINATION THAT IS NARROWLY TAILORED TO REMEDY PRIOR RACE DISCRIMINATION.

Uncertainty in the law breeds litigation. At the heart of the issues raised in this case is this Court's decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

---

[6] (...continued)
prisons. In *Cooper v. Aaron*, 358 U.S. 1 (1958), the federal troops held back the jeering whites from the nine African-American children.

The Court of Appeals for the Seventh Circuit had interpreted *Croson*, in at least two opinions prior to its decision in this case, as prohibiting government from racially discriminating under the Fourteenth Amendment to the United States Constitution unless that discrimination was necessary to remedy prior discrimination.

In 1991, the Court of Appeals wrote:

> Croson holds that the equal protection clause forbids states and municipalities to discriminate in favor of blacks and other minorities unless the discrimination is necessary to rectify discrimination against the favored groups. . . . And *a majority of the Justices of the Supreme Court believe that racial discrimination in any form*, including reverse discrimination, *is unconstitutional* when done by states or municipalities, *unless the purpose is to provide remedy for discrimination* against the favored group. *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419, 421-422 (7th Cir. 1991) (emphasis added)

In 1993, the Court of Appeals wrote:

> The equal protection clause forbids states to give preference to persons on the basis of their race (or ethnicity, but this needn't be discussed separately), even if theirs is not the white race. *City of Richmond v. J.A. Croson Co.*, supra, 488 U.S. at 493, 109 S.Ct. at 720; *United States v. City of Chicago*, 870 F.2d 1256, 1261 (7th Cir. 1989). To that extent *the Constitution is truly colorblind. The Supreme Court has, however, carved an exception for the case in which discrimination against whites is necessary to rectify previous discrimination* in their favor committed by the state

> agency that is seeking to practice remedial discrimination. *City of Richmond v. J.A. Croson Co.*, *supra*, 488 U.S. at 509, 109 S.Ct. at 729; *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986) (plurality opinion); *Associated General Contractors of California, Inc. v. Coalition for Economic Equality*, 950 F.2d 1401, 1412 (9th Cir. 1991). We must decide whether the defendants have so far succeeded in bringing themselves within the exception that no reasonable trier of fact could doubt that the discriminatory promotions described above were appropriate remedial measures; only then would the defendants be entitled to summary judgment, foreclosing the plaintiffs' right to a trial. *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993). (*en banc*) (emphasis added)

In its decision in this case, the Court of Appeals abruptly changed its interpretation of this Court's decision in *Croson*. It abandoned its interpretation that race discrimination was limited to remedying prior race discrimination. It characterized its prior analysis of this Court's holding in *Croson* as dicta and went on to hold that race discrimination could survive strict scrutiny

> . . . if the defendants show they are motivated by a truly powerful and worthy concern and that the racial measure that they adopted is a plainly apt response to that concern. A-4, 5

Thus, the Court of Appeals departed from its previous view and held that the State could discriminate on the basis of race even though there had been no history of prior race discrimination.

The cases cited by the Court of Appeals in this case predate this Court's decision in *Croson*. *Barhold v. Rodriguez*, 836 F.2d 233 (2nd Cir. 1988); *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981); *Minnick v. California Dept. of Corrections*, 157 Cal.Rptr. 260 (Cal. App. 1979). *Barhold* and *Minnick* can be distinguished from this case in that they involved written affirmative action plans.

In *Barhold*, the Court of Appeals reversed the District Court's entrance of summary judgment in favor of the employer. The Court held:

> *Divisions's* [the employer] *plan can be justified only if the discriminatory impact of the seniority based reassignment policy was the result of prior discrimination*. 863 F.2d at 237 (emphasis added)

The Court went on to hold:

> . . . the statistics presented below are sufficient to provide a firm basis for believing that the Defendant engaged in *past discriminatory practices*. Division's statistics just do not show that connection. The bare statements in the record are inadequate to link the statistics to *past discriminatory practices*. 863 F.2d at 237

In the *Detroit Police Officers Association* case, the Court concluded it was uncontroverted that the Detroit police department was guilty of race discrimination in its employment practices both before and after the enactment of Title VII. The decision is based on race discrimination by the City of Detroit. That factor is not present in the instant case.

In *Talbert*, the Court concluded that the plaintiff did not prove discriminatory intent.

In *Minnick*, the affirmative action plan was related to the percentage of minority inmate population but that decision not only predated *Croson*, it also predated *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Petitioners submit the mere correlation of the race of the employees to the race of persons served was rejected in *Wygant*.

Petitioners respectfully submit these cases do not support the Court of Appeals' decision in this case, or if they do, they were overruled by *Croson*.

The holding of the Court of Appeals in this case is in sharp contrast to the holding of the Court of Appeals for the Fifth Circuit in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996).

In *Hopwood* the Court of Appeals, in great detail, analyzed this Court's decisions in race discrimination cases and concluded:

> Foremost, the Court appears to have decided that *there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs*. In Croson, 488 U.S. at 493, 109 S.Ct. at 722 (plurality opinion), the Court flatly stated that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 78 F.3d at 932 (emphasis added)

In this case the Respondents promoted Hilliard primarily because he is an African-American. In *Hopwood*, the Court of Appeals rejected such an approach because it, in itself, is racist in nature:

> The assumption is that a certain individual possesses characteristics by virtue of being a member

> of a certain racial group. This assumption, however, does not withstand scrutiny. "[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 *Sup. Ct. Rev.* 12 (1974), 1996 WL 120235, 12.

Thus, there is a fundamental difference in interpretation of *Croson* among the Courts of Appeal. This Court should not allow constitutional rights to vary depending on geography. At this time the Court of Appeals for the Seventh Circuit has interpreted *Croson* to allow the State to make a decision based primarily on race even though that decision is not, in any way, a remedy for prior discrimination. The Court of Appeals for the Fifth Circuit has interpreted *Croson* to mean that the only compelling state interest that permits race discrimination is to remedy the past wrong of race discrimination. Not only is this a significant difference of opinions between Circuits, that difference deals with a most important area of the law: discrimination based on race. The very significance of the differences between the Circuits and the significance of this particular area of the law cry out for adjudication by this Court. Only this Court can determine whether *Croson* stands for the proposition that race discrimination will be tolerated only to remedy prior race discrimination or whether there are other compelling reasons that justify race discrimination. This Court should grant the Petition for Writ of Certiorari for Fourteenth Amendment rights must be accorded uniform

protection and uniform interpretation throughout this nation.

II.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI DUE TO THE VERY IMPORTANCE OF THIS AREA OF THE LAW.

Petitioners respectfully suggest that if ever there was an area of the law that needed definitive answers it is the area of race discrimination. If race discrimination is to be tolerated under the Fourteenth Amendment only to remedy prior race discrimination, this nation needs to know that. If the Fourteenth Amendment permits race discrimination where there has been no history of race discrimination, this nation needs to know that—and needs to know the standard by which that race discrimination will be judged. Only this Court can provide those definitive answers.

Petitioners understand that there may be great value in some areas of the law to having the lower courts wrestle with, and flush out, legal principles before review by this Court. But given the nature of race relations in this nation, this nation's history of segregation, this nation's history of discrimination and this nation's attempts to end segregation and discrimination, it is imperative for governmental decision-makers to know if decisions based on race may be constitutional even if there is no history of prior discrimination.

The Court of Appeals set forth new standards for governing race discrimination: "a truly powerful and worthy concern" and that the racial measure taken is "a plainly apt response to that concern." Petitioners submit this is

a far cry from a narrowly tailored remedy to deal with prior race discrimination.

The Court did not address whether these new standards require the Respondents to prove that racially neutral measures could have resolved the perceived potential problems. Such racially neutral measures include diversity training including communication, building prisons closer to areas where all races reside, use of the Upward Mobility Program, building enough prisons and boot camps to avoid overcrowding, intense security training for employees to establish fair procedures and consistency, discipline of employees if they do not act fairly. As the District Court found in this case the very nature of the boot camps defeated the need for race as a factor in selection because the inmates themselves had every motivation to succeed: they were nonviolent, first time offenders who could reduce an eight year sentence to 120 to 180 days. If all Respondents need demonstrate is that the racial measure is an apt response to a truly powerful and worthy concern, this Court needs to say that at this point in time.

It is also important to note the Court of Appeals did not list each of the factors the Respondents used to justify their decision to promote Hilliard. Rather, the Court of Appeals swept the reasons into a concept of penological necessity (A-2) with the underlying premise that the boot camp had a better chance of succeeding if there were race discrimination. Petitioners are certain government officials in the South thought education had a better chance of succeeding in the 1950's if there were segregated schools—or that prisons systems had a better chance of succeeding if there were segregation.

Petitioners respectfully submit that this Court has previously rejected the factors cited by Respondents to justify discrimination: racial composition of the persons to be served by the government and racial disparity between staff and inmates, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); intense confrontation, safety, minimizing racial tensions and efficient operation, *Cooper v. Aaron*, 358 U.S. 1 (1958).[7]

This latter case is particularly important when the underlying premise of Respondents' position is that race discrimination can ease racial tension and racial violence. In *Cooper*, the school board of Little Rock, Arkansas, had assigned nine black children to a previously all white high school. Racial tensions and violence rose to such a degree that the Arkansas National Guard stood at the doors to the school with bayonets so the nine could not enter the school. President Eisenhower then sent federal troops to protect the black children. After one year, the school board asked the District Court to suspend the desegregation plan because it disrupted public order and interfered with the educational process. The board hoped the delay would reduce racial tensions.

---

[7] Respondents also cited "perceived" notions of fairness on the part of the inmates as justification for racial discrimination. While Petitioners believe this "problem" could be addressed by racially neutral measures, Petitioners believe only concrete evidence can justify race discrimination. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), *Wygant v. Jackson Board of Education*, 476 U.S. 267 1842 (1986), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991). Petitioners find it ironic that Respondents have imposed an actual unfair employment system to improve "perceptions" of fairness by the inmates.

This Court rejected any suspension of integration holding:

> One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. 358 U.S. at 15.
>
> *The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder* which have followed upon the action of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." Buchanan v. Warley, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149. *Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.* 358 U.S. at 16. (emphasis added)

Justice Frankfurter in his concurring opinion said:

> No explanation that may be offered in support of such a request [to suspend integration] can obscure *the inescapable meaning that law should bow to force*. To yield to such a claim would be to enthrone official lawlessness and lawlessness if not checked is the precursor of anarchy. . . . Violent resistance to law cannot be made a legal reason for its suspension without loosening the

> fabric of our society. 358 U.S. at 22. (emphasis added)

Apparently, it is now necessary for this Court to reaffirm the extremely important principle that constitutional rights will not yield to racial tensions and racial violence.

The Respondents have determined that it is worthwhile to select employees based on race in order to solve perceived problems present at correctional boot camps. Petitioners submit this Court cannot allow such a principle to stand. Hilliard was not a victim of race discrimination. The Petitioners did not discriminate. But Hilliard has been promoted with an increase in pay because of the color of his skin. Had that color been reversed Petitioners respectfully submit no one would have had a problem in finding a violation of constitutional rights without qualified immunity. This Court should grant the Petition for Writ of Certiorari.

III.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO PREVENT NUMEROUS OTHER VIOLATIONS OF CONSTITUTIONAL RIGHTS.

As noted previously uncertainty in the law breeds litigation. If government can discriminate on the basis of race for purposes other than remedying prior race discrimination, this Court should say so now and then let the lowers courts wrestle with the development of that holding.

But if *Croson* stands for the principle that government may discriminate only to remedy prior race discrimination, the failure of this Court to say so now will result in just what happened in the District Court in this case: the

Court will find a violation of constitutional rights but, as government experiments with race discrimination, the doctrine of qualified immunity will prevent full vindication for that violation.

And Petitioners do not use the word "experiment" lightly. Petitioners respectfully submit the Court of Appeals' opinion in this case is an invitation to government to experiment in race relations. Petitioners fear the result will have far greater impact on the minorities of this nation than on the white population. This Court made clear in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), that the same standards apply whether the discrimination favors white citizens or African-American citizens. Plaintiffs respectfully ask this Court to carefully consider whether the decision in this case will back the Seventh Circuit into a new form of segregation. Elements in our society may seize upon this decision to re-institute discrimination against African-Americans when they believe they have a powerful and worthy concern.

The reasoning of the Seventh Circuit can easily apply to numerous other situations. Can the Army or the Marines discriminate on the basis of race in assigning supervisors to boot camps depending on the racial composition of the members of the camps? Can an inner city high school where racial tensions are high assign teachers and staff based on race claiming that such discrimination lessens tensions and improves learning? Can a predominately white high school limit the number of African-American teachers it will hire claiming that the perceptions of the students as to African-Americans interfere with learning? Can the City of Chicago geographically assign its police officers on the basis of race to ease racial tensions and change "perceptions of fair-

ness"? If DOC had a racially neutral test for assigning inmates to particular penal institutions and after administering that test 90% of the population assigned to one prison were white, could DOC intentionally assign only white supervisors to that prison claiming penological necessity? If there is a particular court that deals with particular crimes (such as crack cocaine) whereby the defendants are primarily African-American, can the chief judge assign only African-American judges to hear those cases in order to attempt to ease racial tensions and improve perceptions of fairness? The list of experimental measures could go on and on. All or many may violate the worthy concern/apt response standard, but because each fact situation will differ qualified immunity will protect those experimenting in race relations.

Petitioners respectfully submit that the decision of the Court of Appeals has truly opened Pandora's Box. The Court of Appeals' explicit limitation of its holding to the boot camp only reenforces the imposition of the doctrine of qualified immunity in subsequent cases. Under the doctrine of qualified immunity the victim will not be able to recover any monies to compensate for that violation.

Before this nation starts down such a slippery slope this Court should decide whether it should begin that descent. If the *Croson* decision means that the Fourteenth Amendment to the United States Constitution permits race discrimination only to remedy prior race discrimination, this Court should say so now before numerous persons of all races are put in jeopardy of violation of their rights without the ability to be fully vindicated for that violation. If government can discriminate for a worthy concern then this Court should say so now and let the lower courts wrestle with implementing

such a standard. This Court should grant the Petition for Writ of Certiorari.

IV.

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER THE PETITIONERS' RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED IN THIS CASE.

If this Court grants the Petition for Writ of Certiorari and holds that the Fourteenth Amendment to the United States Constitution does not permit race discrimination where there has been no prior discrimination, the result will be that Petitioners' rights were violated for the Respondents admitted Hilliard was selected primarily due to his race and that there was no history of prior discrimination in employment practices at DOC.

But if this Court determines that there are compelling reasons for race discrimination, other than a remedy for prior discrimination that pass constitutional muster, this Court should then determine: 1) if the appropriate standards are a truly powerful and worthy concern and an apt response to that concern; 2) if the Respondents still bear the burden of proving that other racially neutral measures could not have solved the perceived problems; 3) if the response to the concern must not only be apt but also must be narrowly tailored.

In their initial brief in the Court of Appeals, Petitioners took the position that a public employer could discriminate on the basis of race only to remedy prior discrimination. After Respondents argued in their brief that the reasons they put forth were compelling reasons

permitting race discrimination, Petitioners responded that, if there was a compelling reason, that was not the end of the inquiry. Petitioners submitted that Respondents did not carry their burden that racially neutral measures could have addressed the "problems" or that the racial selection was narrowly tailored.

There was no affirmative action plan covering either this position or the boot camp. There was no written policy on the use of race in employment decisions. There were no documents at DOC indicating race employment position by employment position. The affirmative action officer admitted DOC had not decided what was the "correct" number of African-Americans for each position. So Respondent McEvers—after consultation with no one—arbitrarily decided two of the thirteen supervisors *must* be African-American.

The very subjective, lack of documented evidence, type of decision-making in this case only demonstrates where this nation is headed if government can discriminate on the basis of race for a worthy concern. And Petitioners truly fear it will be minorities who will suffer far more from such a doctrine.

The consequences of permitting discrimination are weighty. Petitioners have already suffered from discrimination and fear the Court of Appeals' decision, if left to stand, will only increase the numbers of victims of discrimination. This Court should grant the Petition for Writ of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

Of Counsel:
MARY LEE LEAHY
CHERYL R. JANSEN
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411

MARY LEE LEAHY
Counsel of Record
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411
Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 95-3729, 95-4034

EARL WITTMER, EARL CRAIG COX, and JAMES JEFFERS,

Plaintiffs-Appellants,

v.

HOWARD A. PETERS, III, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94 C 3045—**Richard Mills**, *Judge.*

ARGUED MAY 14, 1996—DECIDED JULY 2, 1996

Before POSNER, *Chief Judge*, and ESCHBACH and EVANS, *Circuit Judges.*

POSNER, *Chief Judge.* A number of states, including Illinois, have been experimenting in recent years with "boot camps" (or "shock incarceration," as it is sometimes called) for young criminals, in lieu of conventional prisons. See 730 ILCS 5/5-8-1.1 ("impact incarceration"); *Correctional Boot Camps: A Tough Intermediate Sanction* (Doris L. MacKenzie & Eugene E. Hebert eds., U.S. Dept. of Justice, Feb. 1996); Steven P. Karr & Robert J. Jones, "The Development and Implementation of Illinois' Impact Incarceration Program," in *id.* at 69. The idea is to give

the inmates an experience similar to that of old-fashioned military basic training, in which harsh regimentation, including drill-sergeant abuse by correctional officers, is used to break down and remold the character of the trainee. This appeal raises the question whether the warden of a boot camp can ever take race into account in staffing it.

Illinois opened a boot camp in Greene County in 1993. It is a minimum security facility for nonviolent male criminals who are between 17 and 35 years of age, have no more than one previous felony, and are serving a prison sentence of no more than 8 years. If they complete a 120- to 180-day stint in the camp their sentence is reduced to time served. The camp holds 200 inmates, of whom, at the end of 1993, 68 percent were black. The security staff consists of 48 correctional officers, of whom only 2 were black when the camp opened and during the period relevant to this suit, plus 3 captains all of whom were white and 10 lieutenants of whom 2 (a man and a woman) were black. We do not know the current racial composition of the staff.

The plaintiffs are three white correctional officers who applied unsuccessfully for lieutenants' positions. They claim that the black man who was made a lieutenant was less qualified than they and received the appointment only because of his race. He ranked forty-second in the test given to applicants while the plaintiffs ranked third, sixth, and eighth. The defendants, officials of the Illinois Department of Corrections, do not deny that race was a factor in the appointment of the black but they submitted, in opposition to the plaintiffs' motion for summary judgment, reports by expert witnesses attesting to the penological necessity for the appointment. The judge thought little of these reports, though not because they were unsworn, hence not affidavits, hence not, strictly speaking, admissible to support or oppose summary judgment. Fed. R. Civ. P. 56(e); *Fowle v. C & C Cola*, 868 F.2d 59, 67 (3d Cir. 1989). Both sides presented their expert evidence in this form, and, unlike the situation in

Fowle, neither side objected. Rather, the judge held that the reports did not satisfy the defendants' stringent burden of justifying racial discrimination, and he therefore granted summary judgment for the plaintiffs on liability. But he rejected the plaintiffs' claim for damages, on the ground that the defendants had qualified immunity; and he denied the plaintiffs' request for injunctive relief on the ground that they had not established a causal relation between the appointment of the black and the rejection of their own applications. So he granted no relief to the plaintiffs, and he also refused to award attorneys' fees to them. Their victory on the constitutional issue turned out to be entirely Pyrrhic, and they appeal.

The defendants defend the grounds on which the district judge rejected the relief sought by the plaintiffs, but they also argue that the selection of a black applicant for the lieutenant's position did not, in the circumstances of the case, violate the Constitution. We think this is right, and so need not discuss any other issue. For future reference, however, we point out that the proper form of injunctive relief in this case is not, as the plaintiffs argue, to order the persons discriminated against appointed to the positions that they had applied for, unless they prove they would have been appointed had it not been for the discrimination. With the three plaintiffs all competing for a single position, an order that they all be appointed to it would be absurd. What they lost was merely a chance, and the proper injunctive remedy (the proper damages remedy we discussed in *Doll v. Brown*, 75 F.3d 1200, 1205-07 (7th Cir. 1996)) is to restore the chance by enjoining the discriminatory practice. Whether to go further by booting out the incumbent and letting the plaintiffs compete for his job, rather than just for future openings, would be a matter within the equitable discretion of the district judge. *Id.* at 1205. But all this is on the assumption that the plaintiffs' rights were violated. They were not.

The plaintiffs remind us that discrimination in favor of blacks and members of other minority groups, like dis-

crimination against them, is subject to the test of strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2110-13 (1995) (plurality opinion). It used to be thought that "subject to strict scrutiny" was a euphemism for "absolutely forbidden" ("strict in theory, fatal in fact," was the refrain). Some Justices expressly reject this equation. *Id.* at 2117 (plurality opinion). Whether they are a majority of the Court is unclear, see *id.* at 2101 (plurality opinion); *id.* at 2118 (separate opinion), but enough other Justices reject subjecting reverse discrimination—discrimination in favor of a minority—to strict scrutiny to create a majority of the Court in favor of permitting some reverse discrimination. *Id.* at 2117 (plurality opinion); *id.* at 2122-23 (dissenting opinion). How *much* is permitted is unclear. All that is clear is that discrimination in favor of a minority is sometimes permissible to rectify past discrimination against that minority by the discriminating institution. But this shows that reverse discrimination is not illegal per se, although it does not establish that there are any other exceptions besides the one for correcting past discrimination. That question remains open in the Supreme Court. The plaintiffs, as we are about to see, want us to answer it "no."

While we may assume that a practice that is subject to the skeptical, questioning, beady-eyed scrutiny that the law requires when public officials use race to allocate burdens or benefits is not illegal per se, it can survive that intense scrutiny only if the defendants show that they are motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern. They must show that they had to do something and had no alternative to what they did. The concern and the response, moreover, must be substantiated and not merely asserted. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276-78 (1986) (plurality opinion); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-95 (1989) (plurality opinion); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213-17 (4th Cir. 1993). It is not enough to say that *of course* there should be some correspondence between the racial composition of a prison's population and the racial composition

of the staff; common sense is not enough; common sense undergirded the pernicious discrimination against blacks now universally regretted.

The plaintiffs argue that the *only* form of racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of past discrimination by the public institution that is asking to be allowed to try this dangerous cure. There are dicta to this effect. *City of Richmond v. J.A. Croson Co.*, *supra*, 488 U.S. at 493 (plurality opinion); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991). And certainly it is the most frequently mentioned example of a case in which discrimination is permissible. *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 500 n. 10 (7th Cir. 1993). But there is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison's staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for discrimination and expressed that rejection in the sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored. Other cases, moreover, single out the law-enforcement and correctional settings as the very *clearest* examples of cases in which departures from racial neutrality are permissible. *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979); *Minnick v. California Dept. of Corrections*, 157 Cal. Rptr. 260, 268-69 (Cal. App.

1979). At argument the plaintiffs' counsel conceded, in response to a question from the bench, that separation of the races in a prison that was undergoing a race riot would not violate the Constitution. That is a clearer case for discrimination than this, but our point is only that the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions.

It is not as if the rectification of past discrimination had a logical or equitable priority over other legitimate goals that discrimination might serve. If the plaintiff himself was a victim of discrimination by the defendant and merely seeks a decree that would put him where he would have been but for that discrimination, he is not seeking preferential treatment at all; he is asking merely to be put where he would be in a world that had no discrimination, whether in favor of or against the members of his group. Cf. *Doll v. Brown*, *supra*, 75 F.3d at 1205. But in the usual case in which a remedy giving preference to a racial or other historically disfavored group is defended as necessary to rectify past discrimination, the plaintiffs, the people who will benefit from the remedy, are not the people who were discriminated against, but their successors or descendants. For them the relief is a windfall, and its justification must be sought elsewhere than in notions of compensation that might seem to make a stronger case for a discriminatory remedy than an interest in racial peace or effective prison administration would make. *Adarand Constructors, Inc. v. Pena*, *supra*, 115 S. Ct. at 2118-19 (separate opinion).

We are mindful that the Supreme Court has rejected the "role model" argument for reverse discrimination. See *City of Richmond v. J.A. Croson Co.*, *supra*, 488 U.S. at 497-98 (plurality opinion); *Wygant v. Jackson Board of Education*, *supra*, 476 U.S. at 274-76 (plurality opinion). There are many weak arguments for discrimination, and the "role model" theory, at least to the extent that it has been developed in the cases to date, is one, because of lack of substantiation and a well-nigh unlimited reach.

The argument for the black lieutenant is not of that character. We doubt that many inmates of boot camps aspire to become correctional officers, though doubtless some do. See American Correctional Association, *Standards for Adult Correctional Boot Camp Programs* 14 (1995). In any event that is not the justification advanced. The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts—recognized experts in the field of prison administration—did not rely on generalities about racial balance or diversity; did not, for that matter, defend a goal of racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots. For then a security staff less than 6 percent black (4 out of 71), with no male black supervisor, would be administering a program for a prison population almost 70 percent black in a prison the staff of which is expected to treat the inmates with the same considerateness, or rather lack of considerateness, that a marine sergeant treats recruits at Parris Island.

It is true, as the district court pointed out, that the defendants' expert witnesses had had little experience with boot camps and that the social scientific literature on which they relied does not focus on such institutions. The reason is that these institutions are too recent to have been studied exhaustively, given the leisurely pace at which most academic research proceeds. If academic research is required to validate any departure from strict racial neutrality, social experimentation in the area of race will be impossible despite its urgency. Roughly half the prison population of the United States is black. On the conception of strict scrutiny advanced by the plaintiffs, the first boot camp that tried to alter the racial composi-

tion of its staff would be enjoined. It would be impossible to accrue experience on the issue and the whole boot-camp experiment might fail if, as the defendants' experts believe, its success requires some departure from racial neutrality.

The plaintiffs presented reports by two experts of their own, but these reports do not join issue with the defendants' experts. All that the reports say, which no one denies, is that belonging to the same race as the inmates is not a requirement of effectiveness as a guard. They cast no doubt on the proposition that in the particular circumstances that confronted the Greene County boot camp when it was created three years ago the appointment of a black male lieutenant was essential. The reports are, at most, naked conclusions, and as such do not create a genuine issue of material fact. *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1338-39 (7th Cir. 1989); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993).

The defendants do not argue, and we do not hold, that they would have been entitled to take steps to make the racial composition of the security staff mirror that of the inmate population. That would have gone beyond the limits of demonstrable need. Nor do we hold or believe that prison authorities are entitled to yield to extortionate demands from prisoners for guards of their own race. Cf. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). There is no suggestion of that here. We also do not hold that race is (or is not) a proper factor to take into account in staffing an ordinary prison, in which the guards do not interact with the inmates in the same fierce intimacy as in a boot camp. That issue is not before us either. We do not hold that after correctional boot camps have been around long enough to enable thorough academic (or academic-quality) study of the racial problems involved in their administration, prison officials can continue to coast on expert evidence that extrapolates to boot camps from the experts' research on conventional prisons. Maybe such studies exist, for there have been correctional boot camps since 1983.

Correctional Boot Camps: A Tough Intermediate Sanction, *supra*, at vii. But the plaintiffs do not claim that there are any such studies, and our own research has not turned up any. We hold only that on the record compiled in the district court, the preference that the administration of the Greene County boot camp gave a black male applicant for a lieutenant's job on the ground of his race was not unconstitutional.

One final caveat. We do not understand the plaintiffs to be arguing that even if the district court erred (as we have found) in giving no weight to the reports of the defendants' experts, and the judgment of liability must therefore be reversed, the next step (were the plaintiffs to prevail on the other grounds of appeal that they have presented) should be a trial on that issue. That would be the usual sequel to reversing a grant of summary judgment. But the plaintiffs seem content to lose on the issue of liability if we reject their objections to those reports and their legal submission that only a history of discrimination by the defendants could justify preferential treatment of an applicant for employment on grounds of race. They do not want a trial. If as we believe the only question preserved for our decision, so far as liability is concerned, is which side was entitled to summary judgment, the answer is the defendants.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 27, 1996

Before

Hon. Richard A. Posner, Chief Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

EARL WITTMER, EARL CRAIG COX,
and JAMES JEFFERS,

Plaintiffs-Appellants,

Nos. 95-3729, 95-4034 v.

HOWARD A. PETERS, III, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois.
No. 94 C 3045—Richard Mills, *Judge*.

ORDER

On July 30, 1996, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EARL WITTMER, EARL CRAIG COX,
and JAMES JEFFERS,

JUDGMENT IN A CIVIL CASE

v.

HOWARD PETERS, III and
STEPHEN McEVERS,

CASE NUMBER: 94-3045

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED PURSUANT TO OPINION entered by The Honorable Richard Mills, defendants' motion for summary judgment is ALLOWED IN PART and DENIED IN PART. Plaintiffs' motion for summary judgment is ALLOWED IN PART and DENIED IN PART. The Clerk of the court is directed to enter judgment in favor of the defendants and against the plaintiffs pursuant to Fed.R.Civ.P. 56. The parties are to bear their own costs.

September 1, 1995
Date

/s/ John M. Waters
Clerk

/s/ Marlene Cooke
(By) Deputy Clerk

APPENDIX D

[Dated August 31, 1995]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS—
SPRINGFIELD DIVISION

EARL WITTMER, EARL CRAIG COX, and JAMES JEFFERS,	)	
Plaintiffs,	)	
v.	)	No. 94-3045
HOWARD PETERS, III and STEPHEN McEVERS,	)	
Defendants.	)	

OPINION

RICHARD MILLS, District Judge:

A question of first impression dealing with the Illinois "boot camp" program.

BACKGROUND

Earl Wittmer, Craig Cox, and James Jeffers ("Plaintiffs") are employees of the Illinois Department of Corrections ("DOC"). Defendant Howard Peters, III, was the Director of the DOC at all times relevant to the instant dispute and Defendant Stephen McEvers is the Warden of the Greene County Impact Incarceration Program ("boot camp").

The boot camp[1] is a military-style correctional institution that is designed to instill responsibility, discipline, self-respect, and respect for authority in nonviolent first-time offenders. Eligible offenders who are sentenced to up to eight years in a traditional institution may discharge their sentences by participating in and successfully completing a 120-180 day program. Inmates at the boot camp are required to submit to an arduous schedule of paramilitary exercises, physical training, and hard labor; they also participate in intensive programs relating to education, drug treatment, prerelease preparation, and individual and group counseling. The boot camp employs an intense, highly structured, and regimented routine which, unlike traditional prison environments, requires the staff to be verbally aggressive and confrontational towards the inmates. African Americans comprise approximately 60% to 70% of the inmate population at the boot camp.[2]

The security staff at the boot camp consists of three captains, ten lieutenants, and forty-eight correctional officers. In December of 1992, the DOC's Jacksonville Correctional Center posted ten vacant lieutenant positions that were required to be filled by March of 1993, the opening date of the boot camp. Plaintiffs applied for promotions to those positions. Four of the ten positions

---

[1] The boot camp is affiliated with the Jacksonville Correctional Center, a minimum security institution. Warden McEvers oversees the operation of both facilities.

[2] Although the composition of the inmate population varies each time a class of inmates graduates and a new class enters, the proportion of black inmates has not fluctuated drastically since the boot camp's opening in March 1993.

were filled through an "upward mobility program," a contractually mandated, non-discretionary promotion system based on seniority. Three of these promotions were awarded to white males; the fourth went to an African American female. The remaining six lieutenant positions were filled through a multi-faceted selection process, which consisted of (1) a physical agility test, (2) a written examination, (3) an oral review, and (4) Warden McEvers' personal evaluation of the candidates' qualifications, prior work experience, and relevant skills and attributes.

Eighty-four lieutenants, sergeants, and correctional officers from Jacksonville and other institutions around the State applied for the six lieutenant positions and the three captain positions. Each of the eighty-four applicants who participated in the selection process had received an "A" grade from the Department of Central Management Services and were therefore qualified for a lieutenant position. Forty-nine of the applicants, including Plaintiffs, passed the physical agility test and were otherwise qualified to take the written examination and participate in the oral interview process. Following the written examination and oral interview, the scores of each of the forty-nine candidates were compiled and each candidate was then ranked according to his respective score.

Warden McEvers decided to promote Kim Kirchner, a white male who ranked first (2) Frank Spaulding, a white male who ranked fourth, (3) Jeff Bates, a white male who ranked fifth, (4) Scott Lancaster, a white male who ranked tenth, (5) Keith Graham, a white male who ranked eleventh, and (6) Gregory Hilliard, an African American male who ranked forty-second. Plaintiffs Witt-

mer, Cox, and Jeffers—white males who ranked third, sixth, and eighth, respectively—were not promoted.

On the "employment decision form," Warden McEvers noted that Hilliard was promoted "primarily because he is African American." Warden McEvers further noted that the DOC "endeavor[s] to recruit and promote qualified minorities not only to meet affirmative action goals, but also because the majority of our inmates are minorities."

The DOC did *not* have an affirmative action plan governing the promotion of minorities to the rank of lieutenant.[3] There was also no evidence of past discrimination against minorities in the DOC's promotional practices. Prior to Hilliard's promotion, two of the forty-eight correctional officers at the boot camp were African American and, as noted above, one of the lieutenants was an African American female.

This case comes to us on cross motions for summary judgment.

LEGAL STANDARD - SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine

---

[3] The DOC did have an affirmative action plan for the *hiring* of minorities, but not for the promotion of minorities.

issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

DISCUSSION/ANALYSIS

Plaintiffs initiate this action under 42 U.S.C. § 1983, claiming that Warden McEvers' decision to promote Hilliard to a lieutenant position because he was African American violated their rights guaranteed by the Fourteenth Amendment's Equal Protection Clause. In order to succeed under § 1983, Plaintiffs must establish two elements: (1) that the conduct complained of was committed by a person acting under color of state law and (2) that this conduct deprived them of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990) (citing, *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). No one disputes that Warden McEvers' conduct, if actionable, was committed while acting under color of state law; accordingly, this order is concerned solely with the second element.

I

The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Because decisions based on one's race are "in most circumstances irrelevant and therefore prohibited," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), "inherently suspect," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (quoting, *Univ. of California Regents v. Bakke*, 438 U.S. 265, 291 (1978)), and "so seldom provide a relevant basis for disparate treatment," *Fullilove v. Klutznick*, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting); as recently stressed by the United States Supreme Court, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Pena*, No. 93-1841, LEXIS 4037, *45 (June 12, 1995). In other words, racially motivated employment decisions are constitutional only if they (1) are justified by a compelling governmental interest and (2) are narrowly tailored to further that compelling interest. *Adarand*, at *51; *Wygant*, 476 U.S. at 274.

Regarding the first prong of the Court's examination, Defendants argue that the State of Illinois has a compelling interest in the safe, efficient, and successful operation of its boot camps. Due to the fact that the majority (roughly 60% to 70%) of the boot camp's inmates were expected to be African American, Defendants claim that sufficient African American representation at the lieutenant position was necessary in order to ensure that the boot camp would function safe and properly. Therefore, Warden McEvers argues that he was entitled to consider

race in the challenged promotional decision due to the "operational needs" of the boot camp.

The Court agrees with Defendants' position that the State of Illinois has a compelling interest in the safe and proper functioning of its boot camps.[4] It is also our belief that Warden McEvers' act of promoting Hilliard to a lieutenant position because he is African American was a prudent decision; a decision that reflects a practical, realistic, and sensible approach to prison management. *See Minnick v. California Dep't of Corrections*, 95 Cal. App.3d 506 (1979), *cert. dismissed*, 452 U.S. 105 (1980); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-

---

[4] Plaintiff's argue that the *only* instance where a state may take race into account in an employment decision is to remedy past discrimination. In short, Plaintiffs' contention is simply wrong. That has never been the law in this circuit, nor anywhere in this country. *See Adarand*, at *102-103 (Stevens, J., dissenting); *Wygant*, 476 U.S. at 286 (Connor, J., concurring) ("And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts . . . to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 566 (1990) (Although not analyzed under strict scrutiny, the Court held that the F.C.C. policy at issue "serve[d] the important governmental objective of broadcast diversity."); *Britton v. South Bend Community School Corp.*, 819 F.2d 766, 773 n.1 (7th Cir. 1987) ("Remedying past discrimination is not necessarily the only government purpose sufficiently compelling to justify the remedial use of race."). As will be discussed in this opinion, a State may take race into account for any purpose as long as there is a compelling interest and the means employed are narrowly tailored to further that interest. We are not aware of any opinion which holds that the *only* compelling governmental interest is remedying past discrimination.

96 (6th Cir. 1979); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2nd Cir. 1988).

The Court's beliefs, however, are not the issue here. It is important to keep in mind that the Court must strictly scrutinize Warden McEvers' decision. In short, based on this stringent standard, we believe the evidence is insufficient to support Defendants' position that Hilliard's promotion to the rank of lieutenant was necessary for the safe and proper functioning of the boot camp.

Here's why.

In support of their position, Defendants submit the affidavits of Warden McEvers; former Director of the Illinois DOC, Howard Peters; current Director of the Illinois DOC, Odie Washington; Director of the Oklahoma Department of Corrections, Larry Fields; a report by expert, Dr. Peter Scharf; and the results of a recent national study by Dr. Richard C. McCorkle and Dr. Terance D. Miethe.

First, we do not find the testimony of Defendants Warden McEvers, former Director Peters, and current Director Washington helpful to our inquiry. Although they express legitimate opinions about the need for minority representation at all ranks within the correctional system, in themselves, they contain no factual support for the position that minority representation at the rank of lieutenant was necessary for the safe and effective operation of the boot camp.[5] *See Hayes v. North*

---

[5] It appears to the Court that at the time Warden McEvers made the decision to promote Hilliard because of the "operational needs" of the boot camp, he had no experience with the

(continued...)

State Law Enforcement Officers Ass'n, 10 F.3d 207, 215 (4th Cir. 1993).

The testimony of Larry Fields falls into this same category. Although he expresses the same concerns as Warden McEvers, Director Peters, and Director Washington, it is in his best interest to support Defendants' position here. Based on Director Fields' affidavit, it appears that the Oklahoma Department of Corrections also operates under the same informal policy of promoting individuals as a result of their race. We are by no means suggesting that the testimony of the four individuals mentioned above is distorted or misrepresented to support their position. Indeed, their testimony is based on years of experience and expresses legitimate concerns about the safety and proper functioning of correctional institutions. However, once again, it is imperative to stress that the Court must analyze this issue under the strictest of scrutiny. Accordingly, we need more evidence—"objective" evidence—in support of the contention that adequate minority representation at the rank of lieutenant is necessary for the safe and proper functioning of a boot camp. *See Hayes*, 10 F.3d at 215. Certainly, the Equal Protection Clause mandates something more than the subjective opinion testimony of individuals who have a

---

[5] (...continued)
operation of a boot camp. All of his experience was acquired by working in traditional correctional institutions. Yet, Defendants repeatedly stress how the boot camp environment is entirely distinct from that of a traditional correctional institution. Accordingly, how did Warden McEvers know that the "operational needs" of the boot camp necessitated the promotion of two African Americans to the rank of lieutenant?

direct or indirect interest in the outcome of the instant litigation.

This takes us to the report of Dr. Scharf and the national study conducted by Dr. McCorkle and Dr. Miethe. The study by Dr. McCorkle and Dr. Miethe is of no particular relevance to the instant dispute. Their study concerns "the roots of prison violence," *it has nothing to do with boot camps*. In summary, their study concludes that as the percentage of minority staff representation increases (to a certain extent) at minimum, medium, and maximum security prisons, the amount of prison disorder decreases. Dr. Scharf's conclusions in this area are also based on data compiled primarily from studies of traditional correctional institutions, *not boot camps*.

At this point of our discussion, it appears it is appropriate to discuss some critical distinctions between a boot camp and a traditional correctional institution. As repeatedly stressed by Defendants, the boot camp is a very unique environment. There is little resemblance between a boot camp and a traditional prison environment. A boot camp's inmate population is comprised of non-violent offenders between 17 and 35 years of age who have received a sentence of imprisonment of eight years or less. The eligible candidates must volunteer for admission to the boot camp program, no one is required to participate in the program against his will. Further, upon successful completion of the 120 to 180 day program, the inmate's sentence is reduced to time served.

Based on these critical distinctions alone, we fail to see how studies concerning violence in traditional prison systems are relevant to the potential for violence in a boot

camp.[6] For example, doesn't the fact that only younger, *non-violent* (often first-time) offenders are eligible for the boot camp program decrease the likelihood of violence? And what about the fact that an inmate who successfully completes the program can have his entire sentence reduced to time served? In fact, an inmate can have an eight year sentence reduced to 180 days or less. Thus, an inmate has every incentive to "behave" and successfully complete the program, otherwise, he will be returned to prison to serve a more lengthy sentence. Furthermore, unlike traditional prison systems, the boot camp's inmates have very little "free time." They are required to submit to an arduous schedule of paramilitary exercises and they also participate in intensive education, drug treatment, prerelease preparation programs and individual and group counseling. Don't these programs also reduce the likelihood of violence?[7]

---

[6] Defendants not only claim that adequate minority *staff* representation is necessary to promote a safe institution, they also claim that minority representation at the *lieutenant* position is essential. The study by Dr. McCorkle and Dr. Miethe does not differentiate between staff positions. Their study is concerned with the "ratios of white-to-black *correctional officers*," not *lieutenants*. The Roots of Prison Violence, Crime & Delinquency, Vol. 41 No. 3, pg. 328 (July 1995) (emphasis ours). Thus, one question immediately arises: why couldn't Warden McEvers hire more African American *correctional officers* instead of awarding a promotion to a *lieutenant* position because of one's race?

[7] Indeed, as noted by Dr. McCorkle and Dr. Miethe's study, "it appears that institutional order is *best promoted* by involving inmates in programs that offer, not just structure, [ ] opportunities for self-improvement." The Roots of Prison Violence, Crime & Delinquency, Vol. 41 No. 3, pg. 328 (July 1995) (emphasis ours).

In summary, we fail to comprehend how a study concerning completely distinct correctional environments is relevant to the instant dispute surrounding boot camps.[8] In their memoranda submitted to the Court, Defendants continuously discuss and emphasize the uniqueness of the boot camp environment. Yet, they support their position by relying on studies of traditional correctional institutions. As discussed above, the boot camp environment presents many distinct variables that potentially nullify the conclusions rendered in traditional prison studies. Such a visible inconsistency will not pass muster under a strict scrutiny analysis. Perhaps the concerns raised by the Court may prove to be misguided and incorrect. That is not the point, however, The point is that they are legitimate concerns that no one has addressed.

Safety was only one of the concerns expressed by Defendants, though. Defendants also claim that the promotion of Hilliard to the rank of lieutenant was necessary for the boot camp to function properly, to achieve its goals. Due to Defendants' failure to adequately develop this issue, this portion of the "operational needs" issue is not entirely clear. We will do our best, however.

According to Warden McEvers' affidavit, the goals of the boot camp are to "instill discipline and respect in the

---

[8] On page 2 of the cover letter accompanying the study, Dr. McCorkle and Dr. Miethe note that "because boot camps are a relatively recent phenomenon, only 23 boot camps were included in the census of U.S. prisons and only 8 of these programs had predominately black populations. *This small number precludes meaningful statistical analysis.*" (emphasis ours). Thus, apparently, even the academics who conducted the study recognized its inapplicability to boot camps.

inmates so that they can avoid a return to prison in the future." It appears, that Defendants' primary concern here is with the inmates' "perception of fairness." Generally speaking, Defendants' position is that without two African American lieutenants,[9] the inmates would perceive the boot camp's highly confrontational operating philosophy as being racially motivated. This, in turn, would lead to racial tensions which would ultimately defeat the boot camp's purpose of instilling discipline and respect for authority. Thus, we need to know why the inmates' "perception of fairness" is essential to furthering the boot camp's goals of instilling discipline and respect for authority and why the promotion of an African American to a lieutenant position was necessary to boost the "perception of fairness."

It is important to note that at the time of Hilliard's promotion, there were three African Americans on the boot camp's staff; two African American males were correctional officers and one African American female was a lieutenant. It is also important to recognize a distinction here. That is, Defendants are not only claiming that adequate African American representation is required at the *correctional officer* position, but also as to those who supervise the correctional officers, the *lieutenants*.[10]

With this in mind, the study by Dr. McCorkle and Dr. Miethe offers no support for Defendants' position. To the extent that their report even addresses the "perception

---

[9] As noted above, an African American female was promoted to lieutenant through the non-discretionary "upward mobility program."

[10] *See* footnote 6.

of fairness" issue, it does not differentiate between the correctional officer and lieutenant positions.

With respect to Dr. Scharf's report, in many instances it does not appear that he is framing the issue properly. Throughout Dr. Scharf's report, he is constantly factoring into his analysis Hilliard's personal qualities and prior experiences.[11] Whether Hilliard's personal qualities and past experiences would enable him to be an effective lieutenant at a boot camp is irrelevant to the issue before the Court. Hilliard was not promoted as a result of his personal qualities and prior experience. Indeed, he was promoted "primarily" because he is African American. But, we need to know why the inmates' "perception of fairness" and African American representation at the *lieutenant* position is necessary for the boot camp to achieve its goals. This, Dr. Scharf's report fails to answer.

In fact in opinion 2.1 of his report, Dr. Scharf concludes that the promotion of Hilliard to a lieutenant position "*might*" enhance the perception that the program was color blind. Strict scrutiny demands something more than "might."

Furthermore, as noted by Dr. Scharf after his visit to the boot camp, "the perception that staff were strict but fair was an essential element of program success."[12] Thus, why is it necessary for the boot camp to have

---

[11] For example, see Dr. Scharf's report opinion 1.4, 2.3, 2.4, and 2.5.

[12] It should be noted that it appears Dr. Scharf's only "direct" experience with the functioning of a boot camp involved a single visit to the boot camp at issue on February 28, 1995.

African American representation at the *lieutenant* position to convey the perception of fairness? After viewing the videotape of the intake process, we observed that both white and black inmates were treated identically by both white and black *correctional officers*. Doesn't equal treatment by both white and black officers enhance the perception of fairness?

In summary, we are not convinced that Dr. Scharf's report is strong enough to support Defendants' position. First, in many instances, Dr. Scharf considers issues other than race. Second, according to Dr. Scharf's very own report, Hilliard's promotion "*might*" enhance the perception that the program is color blind. Finally, there is not enough evidence as to why African American representation at the *lieutenant* position, as opposed to the *correctional officer* position, is essential to the proper functioning of a *boot camp*, as opposed to a traditional prison environment.

Although we believe a state has a compelling interest in the safe and proper functioning of its boot camp, we do not believe the evidence is sufficient to support Defendants' claim that Hilliard's promotion to a lieutenant position was necessary to promote this compelling interest.[13] Thus, Plaintiffs are entitled to summary judgment on their equal protection claim.[14]

---

[13] Since the evidence is insufficient to support Defendants' claim, there is no need to determine if Warden McEvers conduct was narrowly tailored.

[14] In our order of August 4, 1995, we discussed Director Peters' liability. In summary, although Director Peters was not involved in the promotional process other than administrative-

(continued...)

II

Next, Defendants claim that if they are liable for violating the Fourteenth Amendment's Equal Protection Clause, they are nevertheless entitled to qualified immunity.

The Court agrees.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test for immunity is whether "the law was clear in relation to the specific facts confronting the public official when he acted." *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 968 (1988). "Before a right is clearly established it must be sufficiently particularized to put potential defendants on notice that their conduct is unlawful." *Id.* (quoting, *Colaizzi v. Walker*, 812 F.2d 304, 310 (7th Cir. 1987) (Bauer, C.J., dissenting)). "Once the defendant's actions are defined or characterized according to the specific facts of the case this characterization is compared to the body of law existing at the time of the

---

[14] (...continued)
ly approving each promotion, as Director of the DOC he was well aware of and condoned the informal policy of promoting individuals based on race. Under *Rascon v. Hardiman*, 803 F.2d 269, 274-75 (7th Cir. 1986), Director Peters' conduct supports a finding of liability in both his official and individual capacities. *See Dye v. Sheahan*, No. 93-C-6645, LEXIS 3027, *20-21 (N.D. Ill. March 10, 1995).

alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." *Id.* The plaintiff "bears the burden of establishing the existence of the allegedly clearly established constitutional right." *Id.*

Here, Warden McEvers promoted an individual because he is African American due to the perceived "operational needs" of the boot camp.[15] Accordingly, Plaintiffs must identify identical or closely analogous case law prior to Warden McEvers' conduct that clearly establishes that such conduct was unconstitutional. *Id.* For obvious reasons, Plaintiffs fail to identify any such cases or authority. Indeed, this is essentially an issue of first impression.

As already discussed, this issue is grounded in the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause permits race based decisions as long as such classifications serve a compelling state interest and are narrowly tailored to further that interest. *Adarand*, at *51. The sparse closely analogous case law in this area is generally consistent with Warden McEvers' claim that adequate minority representation in certain law enforcement fields is essential to the safe and

---

[15] In their discussion concerning qualified immunity, Plaintiffs do not dispute that Warden McEvers promoted Hilliard due to the perceived "operational needs" of the boot camp. Indeed, Plaintiffs offer no argument suggesting otherwise. Regardless, based on the deposition testimony and the "employment decision form," it appears clear to the Court that the perceived "operational needs" of the boot camp was in fact the primary motivating factor behind Warden McEvers' promotional decision.

proper functioning of a particular law enforcement body. *See Minnick v. California Dep't of Corrections*, 157 Cal. Rptr. 260 (1979); *cert. dismissed*, 452 U.S. 105 (1980); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2nd Cir. 1988); *Detroit Police Officer's Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

Plaintiffs offer three arguments against Defendants' qualified immunity claim. *First*, Plaintiffs claim that case law supports the position that race may be taken into account *only* to remedy past discrimination, and since there was indisputably no past discrimination here, Defendants violated clearly established law. As discussed in footnote 4, this argument is simply wrong.

Second, Plaintiffs attack the second prong of the strict scrutiny test; arguing that Warden McEvers' act of promoting Hilliard was not narrowly tailored to further the compelling state interest as a matter of law. Specifically, because there was no formal, *written* plan acknowledging the operational needs of the boot camp, Plaintiffs claim the promotion of Hilliard was not narrowly tailored to further the alleged compelling state interest. However, Plaintiffs fail to cite any authority which *requires* the drafting of a formal, written plan in order to satisfy the second prong of the strict scrutiny analysis; nor is this Court aware of any such authority.[16]

---

[16] Because we concluded that the evidence was insufficient to support Defendants' claim, there was no need for the Court to discuss whether Warden McEvers' act of promoting Hilliard was narrowly tailored to further the compelling state interest.

Third, Plaintiffs claim that Title VII prohibits the use of a "business necessity defense" based on race. Regardless of what Title VII prohibits, the Equal Protection Clause allows race based decisions if a compelling state interest exists and the means employed are narrowly tailored to further that interest. Furthermore, as cited above, the closely analogous case law in this area supports Warden McEvers' conduct. Thus, whatever impact Title VII has on this issue, it certainly does not clarify matters.

Therefore, since Plaintiffs have failed to carry their burden of establishing that Defendants were on notice that their actions violated clearly established law, Defendants are entitled to qualified immunity.

Of course, "qualified immunity shields defendants only in their individual capacities." *Knox v. McGinnis*, 998 F.2d 1405, 1412 (7th Cir. 1993). Here, Warden McEvers and Director Peters were also sued in their official capacities. However, "it is by now well settled that '[a] suit for damages against a state official in his or her official capacity is a suit against the state for Eleventh Amendment purposes.' " *Id.* Consequently, "[b]ecause the State of Illinois has not consented to being sued in federal court in the statute creating its Department of Corrections (see Ill. Rev. Stat. ch. 38, ¶¶ 1001-1201), the official capacity claims for damages are barred by the eleventh amendment." *Id.*[17]

---

[17] Neither party has addressed the Eleventh Amendment issue in their briefs.

CONCLUSION

Based on the preceding analysis, we conclude that the State of Illinois has a compelling interest in the safe and proper functioning of its boot camps. However, we do not believe the evidence is sufficient to support Defendants' claim that the promotion of Hilliard to a lieutenant position was necessary to further that interest. Regardless, because there is no clearly established authority that could have placed Defendants on notice that their actions violated the law (assuming they did in fact violate the law), qualified immunity shields Defendants from liability in their individual capacities. Moreover, because the State of Illinois has not consented to be sued, the Eleventh Amendment bars suit against Defendants in their official capacities.

Ergo, Defendants' motion for summary judgment is ALLOWED IN PART and DENIED IN PART. Plaintiffs' motion for summary judgment is ALLOWED IN PART and DENIED IN PART.

CASE CLOSED.

SO ORDERED.

ENTER: 31 August, 1995

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

APPENDIX E

[Dated August 3, 1995]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS—
SPRINGFIELD DIVISION

EARL WITTMER, EARL CRAIG COX and JAMES JEFFERS,	)	
Plaintiffs,	)	
v.	)	No. 94-3045
HOWARD PETERS, III and STEPHEN McEVERS,	)	
Defendants.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendant Howard Peters' motion for summary judgment.

The Court will not recite the underlying factual basis of Plaintiffs' complaint, the parties are well aware of those facts. We will only discuss the facts necessary to determine if Peters should be granted summary judgment. Additionally, for purposes of this order, we will assume that Plaintiffs' § 1983 will succeed and Defendants are not entitled to qualified immunity (these issues will be discussed when we analyze Defendant McEvers' motion for summary judgment).

Peters argues that he is entitled to summary judgment because he was not "personally" involved or responsible for the decision by McEvers to promote Gregory Hilliard. Based on the deposition testimony, it appears McEvers was solely responsible for the promotional decision in the sense that McEvers did not consult or confer with, or seek the input of anyone during the selectional process at issue. Apparently, Peters' "personal" involvement in the promotional process was purely for administrational purposes; consisting of nothing more than formally approving each promotion. Accordingly, Peters claims that he is entitled to summary judgment.

It does not appear to the Court that Plaintiffs disagree with our recitation of the facts to this point. However, in Plaintiffs' response, they are not arguing that Peters was directly or "personally" involved in the promotional process of Hilliard. Instead, Plaintiffs claim that the consideration of race for operational purposes was an approved, informal policy within the Department of Corrections, a policy that Peters, as director, was well aware of and condoned. Indeed, Peters' deposition testimony supports this position. It appears to the Court that Plaintiffs' theory of liability can indisputably support a finding of liability against Peters in both his individual and official capacities as director of the Department of Corrections. *See Rascon v. Hardiman*, 803 F.2d 269, 274-75 (7th Cir. 1986); *Dye v. Sheahan*, No. 93-C-6645, LEXIS 3027, *20-21 (N.D. Ill. March 10, 1995).

Accordingly, because Peters was both aware of and condoned the unwritten policy of promoting individuals based solely on race for operational needs purposes, based on *Rascon*, Peters' motion for summary judgment is denied. However, because the Court has essentially

raised this issue *sua sponte* and Peters has not had the opportunity to discuss the ramifications of *Rascon*, Peters has seven days to respond to this order if he so chooses.

Ergo, Defendant Peters' motion for summary judgment (d/e 97) is DENIED.

ENTER: 3 August, 1995.

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

Supreme Court, U.S.
FILED
DEC 27 1996
CLERK

No. 96-852

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

EARL WITTMER, EARL CRAIG COX AND JAMES JEFFERS,

Petitioners,

v.

HOWARD A. PETERS, III, AND STEPHEN McEVERS,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

James E. Ryan
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601
(312) 814-3312

Attorneys for Respondents

Jeffrey D. Colman
Counsel of Record
Edward J. Lewis II
Special Assistant
Attorneys General
David A. Schwartz
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

31 pp

QUESTIONS PRESENTED

The Petition for Writ of Certiorari ("Petition") identifies the following questions as those presented for review:

1. Is the only form of race discrimination permitted by the Fourteenth Amendment to the United States Constitution discrimination that is narrowly tailored to remedy past race discrimination?

2. Does the Fourteenth Amendment to the United States Constitution permit race discrimination in employment decisions by a public employer when that employer has had no history of past race discrimination in employment?

3. If the Fourteenth Amendment to the United States Constitution permits race discrimination in employment decisions where there is no history of prior discrimination, are the appropriate standards permitting that race discrimination under the strict scrutiny test: 1) motivation by a truly powerful and worthy concern; 2) a racial measure that is a plainly apt response to that concern?

4. Did the Respondents violate the Petitioners' right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution when they promoted an African-American over Petitioners to the position of lieutenant at the Illinois Department of Corrections primarily because he was an African-American?

PARTIES TO THE PROCEEDINGS

The parties are properly identified in the Petition, at ii.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. The Promotion of Lieutenant Hilliard 3

B. The Decision In The District Court 7

C. The Decision In The Court Of Appeals 8

REASONS FOR DENYING THE WRIT 9

I. THE SEVENTH CIRCUIT'S APPLICATION OF STRICT SCRUTINY WAS ENTIRELY CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT 10

A. The Petition Does Not Present A Substantial Question For Review By This Court 10

B. There Is No Conflict On This Issue In The Courts Of Appeals 15

II. PRUDENTIAL CONSIDERATIONS STRONGLY MILITATE AGAINST GRANTING CERTIORARI IN THIS CASE 18

A. In The First Instance This Court Should Permit The Lower Courts To Evaluate The Constitutionality Of Racial Considerations That May Never Have Occurred To The Parties Or To Members Of The Court 19

B. The Unique Procedural Posture Of This Case Militates Against Granting The Writ 20

III. THE COURT OF APPEALS CORRECTLY APPLIED STRICT SCRUTINY IN THIS CASE AND REACHED THE CORRECT RESULT . . . 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES **Page**

Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995) 9, 11-12, 14, 18-19

Arizona v. Evans, 115 S. Ct. 1185 (1995) 19

Barhold v. Rodriguez, 863 F.2d 233 (2d Cir. 1988) 15

Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993) 17

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 13-15

DeFunis v. Odegaard, 416 U.S. 312 (1974) 20

Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) 15

Fullilove v. Klutznick, 448 U.S. 448 (1980) 11

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993) 15

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996) 15-17

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 22

Lee v. Washington, 390 U.S. 333 (1968) 14

McCray v. New York, 461 U.S. 961 (1983) 19

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991) 17

Minnick v. California Department of Corrections, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), *cert. dismissed*, 452 U.S. 105 (1981) . . . 15

North Carolina v. Rice, 404 U.S. 244 (1971) 20

Talbert v. City of Richmond, 648 F.2d 425 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) 15

United States v. Paradise, 480 U.S. 149 (1987) 12

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 12-14

INTRODUCTION

This case arises out of the efforts of the Illinois Department of Corrections ("the DOC") to transform certain first-time convicted felons into productive and responsible citizens by implementing "impact incarceration" programs, also known as boot camps. Substantial discovery was conducted in this litigation, and the relevant facts are essentially uncontested. In March 1993, when the DOC opened a boot camp in Greene County, Illinois, approximately two-thirds of the 200 inmates were expected to be African-American. In selecting the initial staff for the boot camp, the warden considered a variety of factors that he believed would best serve the unique aims of the correctional facility, including the skills, attributes and experiences of the forty-nine candidates deemed qualified for supervisory positions. In an effort to reduce the gross disparity between the racial compositions of the largely African-American inmate population and the overwhelmingly white security staff, and in order to ameliorate tensions and foster positive communications and relationships between the inmates and staff, the warden selected an African-American male to fill one of the ten lieutenant positions at the boot camp.

Petitioners are non-minority DOC employees who were not selected to fill any of the ten lieutenant positions at the boot camp. In 1994, petitioners filed this suit under 42 U.S.C. § 1983 alleging that their rights to equal protection were violated because the warden — in pursuit of his goal of creating and maintaining a safe and secure correctional institution — selected one African-American male on the basis of a racial preference.

The Seventh Circuit held that the warden's decision to promote one African-American male to serve as a

lieutenant at the boot camp was constitutional because it met this Court's strict scrutiny standard.[1]

Petitioners now ask this Court to issue a writ of certiorari on the principal contention that racial classifications that are not aimed at remedying the present effects of past discrimination may *never* withstand constitutional scrutiny. This contention, however, does not present a substantial question requiring resolution by this Court. Indeed, at oral argument in the Court of Appeals, Petitioners' counsel expressly conceded that there *are* compelling state interests, in addition to remedying past discrimination, that warrant the use of racial considerations. (A-6.) This totally appropriate and candid concession answers the primary legal question offered in the Petition.

Respondents — former DOC Director Howard A. Peters, III, and boot camp Warden Stephen L. McEvers — respectfully request that this Court deny the petition for a writ of certiorari. The Seventh Circuit faithfully applied the applicable legal standard to the undisputed facts in the record; the decision of the Court of Appeals therefore broke no new legal ground, and comports with this Court's mandate that all racial classifications must be subject to strict judicial scrutiny. In addition, important prudential considerations weigh against a grant of certiorari in this case.

---

[1] The opinion of the Seventh Circuit is officially reported at 87 F.3d 916 (7th Cir. 1996), and is reproduced at Appendix A of the Petition. Citations herein to the Seventh Circuit's opinion are to "A-__."

STATEMENT OF THE CASE

A. The Promotion of Lieutenant Hilliard

The boot camp in Greene County, Illinois, is a military-style correctional institution designed to instill responsibility, discipline, self-respect, and respect for authority in first-time male offenders convicted of certain crimes. (S.O. App. 5.)[2] Inmates at the boot camp are required to submit to an arduous schedule of paramilitary exercises, physical training, and hard labor; they also participate in intensive programs relating to education, drug treatment, prerelease preparation, and counseling. (S.O. App. 5.) The boot camp employs an intense, highly structured and regimented routine which, unlike traditional prison environments, requires correctional officers and staff to be verbally aggressive and confrontational toward the inmates. (S.O. App. 5.)

Warden McEvers was responsible for filling all of the boot camp's sixty-one security positions, which included three captains, ten lieutenants, and forty-eight correctional officers. (S.O. App. 6.) He selected three white men as captains; of the forty-eight correctional officers only three were African-American. The manner in which the captains and correctional officers were selected is not challenged in this litigation.

Four of the ten lieutenant positions were filled through the non-discretionary Upward Mobility program, a contractually mandated promotion system based on seniority. (S.O. App. 7.) Through operation of this non-discretionary program, three appointments were awarded to

---

[2] "S.O. App." refers to the Supplemental Appendix the State Officials filed with their brief in the United States Court of Appeals for the Seventh Circuit.

white men and one lieutenant position was awarded to an African-American woman. (S.O. App. 7.)

Eighty-four candidates who received a qualifying "A" grade applied to fill the six remaining lieutenant positions. (S.O. App. 6-7.) Forty-nine of those applicants, including Petitioners, passed a physical agility test and were invited to participate in an additional examination, interview, and evaluation process. (S.O. App. 7.) After the written tests and interviews were completed, Warden McEvers compiled a ranking of the candidates based on their scores. (S.O. App. 8.) Warden McEvers, however, did not appoint the lieutenants in rank order. Instead, based on his professional judgment as to the skills and "qualities they might have that would help us open this new facility best," Warden McEvers selected the candidates who ranked first, fourth, fifth, tenth, eleventh, and forty-second. (S.O. App. 10.) The Petitioners were ranked third, sixth and eighth. (S.O. App. 10.) Five of the men promoted were white; the sixth, Gregory Hilliard, who ranked forty-second and who was qualified based on the testing procedures, "was selected primarily because he is African-American." (S.O. App. 11.) The Employment Decision Form signed by Warden McEvers explained: "We endeavor to recruit and promote qualified minorities not only to meet affirmative action goals but also because the majority of our inmates are minorities." (S.O. App. 11.)

Warden McEvers testified at his deposition that when he selected Lieutenant Hilliard, he was aware that approximately two-thirds of the inmate population at the boot camp would be African-American; that only four of the other sixty members of the security staff were African-American; that no African-American males served on the supervisory security staff; and that all security personnel were required to be verbally aggressive and confrontational

toward inmates. (S.O. App. 9-10.) Warden McEvers also testified that based on his twenty-five years of experience in corrections, reducing the racial disparity between the inmates and security staff would ameliorate the tensions that might otherwise breed in the intense, confrontational boot camp environment, and would at the same time foster communication and positive relationships between the inmates and staff. (S.O. App. 9-10.)

As the Seventh Circuit found (A-8), Warden McEvers' judgment that the inclusion of one African-American male on the supervisory staff would advance the correctional aims of the boot camp was essentially undisputed. Respondent Peters, the former director of the DOC with more than twenty years of experience in prison administration, testified at length regarding the importance of race in the administration of prisons. (S.O. App. 12-15.) Mr. Peters explained that a prison is a completely different environment than other workplaces because inmates are confined, have no control over their lives, and are unable to interact with others or have normal life experiences. (S.O. App. 12-13.) Racial issues are critical to the DOC not only because inmates enjoy such limited freedoms and experiences, but also because a high proportion of minority inmates are incarcerated in facilities, like the boot camp at issue here, located in rural areas in central and southern Illinois where there is a small minority population. (S.O. App. 12-13.) Mr. Peters further explained (*id.*) that racial tensions are

> "heightened in a boot camp situation because . . . you've added some additional variables that aren't present in other prisons, *i.e.*, you not only allow but you encourage the staff to be very aggressive toward inmates, to holler at them. It's a very in your face kind of approach. You push and push and push

them right against the wall, then, you push some more."

The importance of racial diversity among the staff at the boot camp also was endorsed by the uncontested affidavits and uncontested reports of experts offered by Respondents. One of the experts, Larry Fields, served as the Director of the Oklahoma Department of Corrections. Director Fields has extensive experience in the personnel, security and operational issues that arise at boot camps. (S.O. App. 17.) Director Fields demonstrated that reducing the racial disparity between the inmate population and the security staff at a boot camp benefits the inmates, the staff, and the institution in a number of ways, including preventing disturbances at the boot camp and encouraging inmates to relate to and form positive relationships with the staff members. (S.O. App. 17.) Director Fields also stated that a racially diverse security staff is vital to the safe and efficient operation of a boot camp because "minority representation among the staff helps reduce inmates' perceptions that they are being treated unfairly because of their race." (S.O. App. 18.)

Respondents also submitted an expert report prepared by Professors Richard C. McCorkle and Terance D. Miethe of the University of Nevada-Las Vegas. The report, which draws on data from the U.S. Department of Justice's most current Census of Adult Correctional Facilities, found that the percentage of minority staff is "one of the strongest correlates and predictors of both inmate-on-inmate and inmate-on-staff assaults" in prisons across the country. (S.O. App. 249.) The McCorkle report noted that "[t]he finding that there is less safety for both inmates and staff in institutions with relatively more white than black guards holds true even after we control for other factors thought to influence rates of prison violence (*e.g.*,

level of security, population size, level of overcrowding)." (S.O. App. 249.) The McCorkle report – which was uncontested by Petitioners – concluded that "within medium security facilities and minimum security institutions like Greene's Boot Camp, small increases in minority staffing (e.g., increasing non-white staff from 5% to 10%) are associated with substantial decreases in the amount of prison unrest." (S.O. App. 251.)

The conclusions reached by Respondents' experts were essentially corroborated by the testimony of Petitioners themselves, as well as by one of their experts. In the words of Dr. Charles Newman, one of the experts retained by Petitioners, "all things being equal, if you have a fully competent staff which has minority representation, you are going to have a safer institution." (S.O. App. 18.)

B. The Decision In The District Court

The district court granted in part and denied in part the parties' cross motions for summary judgment in an Opinion dated August 31, 1995. (D-20.)[3] In its Opinion, the district court found that it was undisputed that Warden McEvers promoted Lieutenant Hilliard in order to advance the goal of creating and maintaining a safe and secure boot camp. (D-4.) The court also ruled that the "State of Illinois has a compelling interest in the safe and proper functioning of its boot camps" that may justify the consideration of race in employment decisions. (D-7.) The court concluded, however, that the evidence supporting the promotion of Lieutenant Hilliard failed to satisfy the strict scrutiny standard under the Equal Protection Clause. (D-6, D-15.)

---

[3] The district court's opinion is reproduced at Appendix D of the Petition, and citations thereto are to "D-__."

The district court nonetheless entered summary judgment for Respondents because the court concluded that the doctrine of qualified immunity barred an award of damages against Respondents in their individual capacities, and the Eleventh Amendment barred an award of damages against them in their official capacities. (D-16 to D-19.) In two subsequent orders, the district court denied Petitioners' requests for injunctive relief (Order, October 20, 1995) and for attorneys' fees and costs (Order, November 20, 1995).[4]

C. *The Decision In The Court Of Appeals*

On appeal, the Seventh Circuit determined that Respondents were entitled to judgment on the merits of Petitioners' equal protection claim because "the selection of a black applicant for the lieutenant's position did not, in the circumstances of the case, violate the Constitution." (A-3.) The Seventh Circuit's legal analysis necessarily began with the recognition that "discrimination in favor of blacks and members of other minority groups, like discrimination against them, is subject to the test of strict scrutiny." (A-3 to A-4.) Applying the "skeptical, questioning, beady-eyed scrutiny that the law requires when public officials use race to allocate burdens or benefits," (A-4), the Seventh Circuit found that the promotion of one African-American lieutenant was (A-7):

> "needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not

---

[4] Neither the court's grant of qualified immunity nor its rulings on Petitioners' requests for injunctive relief and attorneys' fees are before this Court. *See* Petition at i, 11 n.5.

speculation, but is backed up by expert evidence that the plaintiffs did not rebut."

REASONS FOR DENYING THE WRIT

Petitioners claim that this case presents four separate questions for the Court to review. (Petition at i.) In reality, Questions 1, 2 and 4 are essentially the same — they focus on Petitioners' contention that remedying the present effects of past discrimination is the *only* compelling state interest that may justify the consideration of race. Question 3 is Petitioners' unfounded effort to suggest that the Court of Appeals did not apply strict scrutiny in this case. As we demonstrate below, the Petition should be denied for three independent reasons.

First, as demonstrated in Part I, the Petition presents neither a substantial question of law nor a conflict among the lower courts which warrants review. Every appellate court called upon to review the question has determined that prison officials may consider race as a factor in making employment decisions if those decisions are necessary and proper in order to create and maintain a safe and secure correctional facility. Contrary to the Petitioners' position (Petition at 22-23), this Court never has ruled that remedying the present effects of prior discrimination is the only compelling state interest that may justify the consideration of race by a governmental entity. Indeed, the language and logic of the Court's recent decision in *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995), confirms what several Justices have observed in past decisions: a variety of interests may justify the consideration of race if "they are narrowly tailored measures that further compelling governmental interests." *Id.* at 2113. In this case, the Court of Appeals dutifully adhered to this Court's precedents and faithfully applied strict scrutiny to the substantial, undisputed facts in the record. That the Court

of Appeals did so is unremarkable and does not warrant review by this Court.

Second, as we show in Part II, important prudential considerations militate against granting the writ. In Part II.A., we demonstrate that the Court should decline Petitioners' invitation to impose a *per se* rule prohibiting the use of race in all circumstances except one. Instead, the Court should allow the lower courts to address and resolve the myriad potential interests that may – or may not – satisfy the strict scrutiny test. In Part II.B., we demonstrate that the unique procedural posture of this case – including the district court's rulings on qualified immunity, injunctive relief, and attorneys' fees, as well as the substantial issue as to whether Petitioners were harmed by the warden's employment decision – renders this an inappropriate case for review by this Court.

In Part III, we demonstrate that, contrary to Petitioners' claim, the Seventh Circuit did not abandon the strict scrutiny test; to the contrary, the Court properly applied strict scrutiny analysis to the substantial, undisputed facts of this case.

I.

THE SEVENTH CIRCUIT'S APPLICATION OF STRICT SCRUTINY WAS ENTIRELY CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT.

A. The Petition Does Not Present A Substantial Question For Review By This Court.

Petitioners contend that this Court has prohibited every governmental racial classification that is not designed to remedy the effects of past discrimination, and that the Seventh Circuit consequently erred by not following this

Court's precedent. (Petition at 22-23.) This assertion is wrong, and Petitioners' expressly conceded at oral argument in the Seventh Circuit that there indeed *are* compelling state interests — in addition to remedying a history of past racial discrimination — which warrant the use of racial classifications. (A-6.)

Petitioners assertion that there is only one compelling state interest omits any discussion of *Adarand*, the Court's most recent and comprehensive ruling on the constitutional principles governing a public official's consideration of race. In *Adarand*, all nine Justices appeared to agree that interests other than remedying prior discrimination may constitute a compelling state interest. In analyzing the purpose and effect of the strict scrutiny standard, Justice O'Connor wrote for the Court (115 S. Ct. at 2113),

> "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."

In justifying its conclusion that all racial classifications are subject to strict scrutiny, the Court explained that "[t]here is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons." *Id.* at 2116. Quoting with approval from Justice Stevens' dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 553-535 (1980), the Court observed that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important

that the reasons for any such classification be clearly identified and unquestionably legitimate." *Id.* at 2117.[5]

If, as Petitioners contend, remedying prior discrimination is the *only* compelling state interest that may justify a racial classification, there would no longer be a need for strict scrutiny; the only question for judicial review would be whether the means adopted by a government agency which sought to remedy its own prior discrimination were narrowly tailored. That is not, and never has been, the law. In this respect, *Adarand* reflects the Court's repeated recognition that other interests *may* constitute a compelling state interest. In *United States v. Paradise*, 480 U.S. 149, 167 n.18 (1987), for example, this Court expressly reserved the question whether the operational needs of the Alabama Department of Public Safety constituted a compelling state interest. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court rejected the contention that providing "role models" for minority public

---

[5] No member of the Court disagreed with the majority's analysis of this point. Indeed, the separate opinions of Justices Stevens, Souter and Ginsburg emphasize the potential application of strict scrutiny to a variety of interests and circumstances. *See* 115 S. Ct. at 2122 (opinion of Stevens, J.)("Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account"); 114 S. Ct. at 2132 (opinion of Souter, J.)("the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest"); 115 S. Ct. at 2136 (opinion of Ginsburg, J.)("I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions").

school students justified a provision in a collective bargaining agreement which extended preferential protection against layoffs to some minority employees. Justice O'Connor's concurring opinion made clear, however, that (*id.* at 286)(O'Connor, J., concurring):

> "[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."

Justice Stevens' dissent in *Wygant* similarly observed that "in our present society, race is not always irrelevant to sound governmental decisionmaking." *Id.* at 512 n.2 (Stevens, J., dissenting). Pointing directly to the operational needs of a law enforcement agency, Justice Stevens emphasized that (*id.*):

> "[I]n a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers."

At bottom, Petitioners' argument rests entirely on the proposition that this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), prohibits state actors from ever considering race in their decisionmaking unless they are striving to remedy the present effects of past discrimination. *Croson*, however, involved a minority set-aside program designed expressly for the purpose of remedying prior discrimination; the Court's opinion in *Croson* did not address the potential

constitutionality of non-remedial racial classifications generally, let alone the specific context of prison administrators striving to create and maintain safe and secure boot camps. There is certainly nothing in the Court's holding in *Croson* that calls into doubt the Court's subsequent instruction in *Adarand* that strict scrutiny shall apply to all racial classifications.

Indeed, Justice Scalia's concurring opinion in *Croson* states that prison administrators may consider race to protect "life and limb" in a prison riot. 488 U.S. at 521 (Scalia, J., concurring). Such a compelling situation is, of course, unrelated to whether there was a history of past discrimination to remedy. Chief Judge Posner's opinion for the Seventh Circuit in this case makes the same point. (A-6.) *See also Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan and Stewart, concurring)("prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails"). And at oral argument in the Seventh Circuit, Petitioners' counsel conceded that — even in the absence of any history of past racial discrimination — prison authorities may constitutionally segregate inmates by race in the event of a race-related riot. (A-6.)

Having conceded that there are, in fact, instances where race is relevant to "sound governmental decisionmaking," *Wygant*, 476 U.S. at 512 n.2 (Stevens, J., dissenting), Petitioners must accept that the Seventh Circuit properly proceeded to evaluate whether the Respondents presented such an instance in staffing the Greene County boot camp.

B. There Is No Conflict On This Issue In The Courts Of Appeals.

Petitioners also contend that "there is a fundamental difference in interpretation of *Croson*" among the various Courts of Appeals and that "[t]his Court should not allow constitutional rights to vary depending on geography." (Petition at 17.) Petitioners are wrong. They fail to acknowledge that every appellate court which has squarely addressed the issue has concluded that the operational needs of law enforcement or correctional officials *may* justify the use of racial classifications in employment decisions. *See Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213-15 (4th Cir. 1993) (city police force); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (New York State Division of Parole); *Talbert v. City of Richmond*, 648 F.2d 425, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) (city police force); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (same); *Minnick v. California Department of Corrections*, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260, 269 (1979), *cert. dismissed*, 452 U.S. 105 (1981) (state prison system).

Relying on the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), Petitioners purport to find a split between the circuits that requires resolution by this Court. (Petition at 17.) In *Hopwood*, the Fifth Circuit held that the State's interest in promoting diversity at the University of Texas Law School did not justify a race-based admissions program. *Id.* at 948. It is true, as Petitioners argue (Petition at 16), that the Fifth Circuit's analysis contains broad dicta that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs." *Id.* at

944. However, that dicta does not justify a grant of certiorari in this case for two independent reasons.

First, the broad reasoning employed by the panel majority in *Hopwood* was plainly unnecessary to the Court's decision. Despite suggesting that only one compelling state interest will justify a race-based decision, the majority in *Hopwood* explained at length why diversity in an educational setting was not a compelling interest even in the absence of a *per se* rule. *Id.* at 945-48. Furthermore, as noted in Judge Wiener's concurring opinion, the *Hopwood* majority did not need to reach this issue because even assuming that diversity constituted a compelling state interest, the admissions program at the University of Texas Law School "was not narrowly tailored to achieve diversity." *Id.* at 962. For this reason, the seven judges who dissented from the denial of rehearing *en banc* in *Hopwood* emphasized that the panel's finding of a *per se* rule was "wholly unnecessary to the disposition of the matter appealed and thus is clearly dictum." *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996).[6]

Second, the Fifth Circuit's dicta in *Hopwood* is substantively identical to the dicta employed by the Seventh Circuit in earlier cases that similarly suggested that the remediation of prior discrimination is the only compelling

---

[6] The Fifth Circuit's decision is also of limited impact for the additional reason that it may not have involved a live controversy for the purposes of Article III of the United States Constitution. In their opinion respecting the denial of the petition for a writ of certiorari in *Hopwood*, two Justices of this Court indicated that the Fifth Circuit's decision was not worthy of review because the admissions program at issue had been discontinued and therefore was not "genuinely in controversy." 116 S. Ct. at 2581 (Opinion of Ginsburg, J.).

state interest that may justify a racial classification. In *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991), involving a Wisconsin set-aside program for highway contracts, Judge Posner himself suggested in dicta that after this Court's decision in *Croson*, remedying past discrimination was the only cognizable compelling interest. 922 F.2d at 421. *See also Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc) ("The Supreme Court has . . . carved an exception for the case in which discrimination against whites is necessary to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination.")

However, when actually presented with the facts demonstrating the State's compelling interest in this case, Chief Judge Posner correctly retreated from the dicta in *Milwaukee County Pavers*. Chief Judge Posner explained that (A-5):

> "The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison's staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for discrimination and expressed that rejection in the sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored."

We respectfully submit that when it is confronted by a case directly raising the issue, the Fifth Circuit — like the Seventh Circuit — will retreat from its broad dicta and recognize a state's compelling interest in maintaining safe and secure boot camps. There simply is no conflict that warrants review by this Court; at a minimum, the Court should await a contrary decision on the merits of this issue

rather than grant certiorari based on broad dicta suggesting that, in the future, one Court of Appeals might take a different approach.

II.

PRUDENTIAL CONSIDERATIONS STRONGLY MILITATE AGAINST GRANTING CERTIORARI IN THIS CASE

Important prudential considerations also weigh against review of the Seventh Circuit's decision in this case. *Adarand* instructs that racial classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." 115 S. Ct. at 2113. The Seventh Circuit faithfully applied this strict scrutiny standard in determining that the promotion of one African-American male was narrowly tailored to further the State's compelling interest in creating and maintaining a safe and successful boot camp. (A-4 to A-9.) As we show in Part II.A., it is simply too soon to know whether the lower courts will have difficulty differentiating in other cases between constitutional and unconstitutional considerations of race.

In Part II.B., we demonstrate that certiorari also should be denied because of the unique procedural posture of this case. In light of the district court's rulings that Respondents were entitled to qualified immunity, that Petitioners were not entitled to injunctive relief or attorneys' fees, and that the Petitioners suffered no judicially cognizable harm, there is little likelihood that granting the writ will change the position of the parties vis-a-vis each other.

A. In The First Instance This Court Should Permit The Lower Courts To Evaluate The Constitutionality Of Racial Considerations That May Never Have Occurred To The Parties Or To Members Of The Court.

In her dissenting opinion in *Arizona v. Evans*, 115 S. Ct. 1185 (1995), Justice Ginsburg observed that "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Id.* at 1198 n.1 (Ginsburg, J., dissenting, citations omitted). *See also McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J.) ("further consideration of the substantive and procedural ramifications of this problem by other courts will enable us to deal with the issue more wisely at a later date.") This salutary practice strongly militates against review in this case because the lower courts should be given time to address and resolve actual cases asserting actual interests, rather than accepting Petitioners' invitation to render – prematurely – a *per se* rule.

Petitioners lament the uncertainty that will flow from allowing the lower courts to pass judgment on racial classifications which are not at issue in this case. (Petition, 22-25.) But specific racial classifications should not be embraced or precluded out of hand before the courts have an opportunity to test them against the searching standard of strict scrutiny. Only by permitting the lower courts to embark on the task of ferreting out "legitimate from illegitimate uses of race in government decisionmaking," *Adarand*, 115 S. Ct. at 2113, will the Court be able to make an informed judgment about the possible array of race-based decisions that may survive constitutional scrutiny. If denying the Petition will allow the lower courts to continue

this inquiry, as Petitioners suggest, there is no reason to grant the writ.

The Seventh Circuit's holding below is expressly limited to the specific, uncontested facts of this case, *i.e.*, the appointment of a single African-American male to the position of lieutenant at a prison boot camp with an inmate population that is overwhelmingly African-American for the express purpose of creating and maintaining a safe and secure boot camp. (A-8.) There may be other circumstances in which government decisionmakers may constitutionally consider race. *See, e.g.*, p. 14 above. It would be presumptuous, however, to try to identify in the abstract those racial classifications that will pass constitutional muster and those that will not. This Court has consistently identified the appropriate standard to apply to racial classifications; it should now allow the lower courts to apply that standard to new and varied factual situations.

B. The Unique Procedural Posture Of This Case Militates Against Granting The Writ.

This Court has commented repeatedly that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *See, e.g., North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). Due to the unique procedural posture of this case, it is unlikely that any decision of this Court would affect the rights of the litigants. The Court therefore should deny the Petition and devote its resources to a conflict that has a more realistic chance of creating tangible relief for one of the parties.

As shown above at page 7, the district court, without any real explanation, rejected the wealth of evidence Respondents offered to support the racial classification at issue here, and therefore ruled that Petitioners had suffered

a constitutional violation. (D-8 to D-15.) The district court nonetheless entered judgment in favor of Respondents on the question of monetary damages, holding that Respondents were entitled to qualified immunity because they had not violated a "clearly established" constitutional right. (D-16 to D-19.) Despite finding a constitutional violation, the district court also refused to issue the injunction Petitioners sought, which would have required that they be appointed to lieutenant positions at the boot camp. (Order, October 20, 1995.) The district court reasoned that "the requested relief is far too speculative in nature to be granted," (*Id.* at 2), and that Petitioners could not prove causation because "even if Warden McEvers did not take race into consideration regarding the final lieutenant position, certainly Plaintiffs cannot establish that one of them would have been selected for the final promotion." (*Id.* at 4 n.3.) In light of Petitioners failure to win any of the relief they sought, the district court also denied Petitioners' request for costs and attorneys' fees. (Order, November 20, 1995.)

On appeal to the Seventh Circuit, Petitioners argued that the district court erred in holding that Respondents were entitled to qualified immunity, and erred further in denying Petitioners an injunction, costs, and attorneys' fees. (A-3.) The Court of Appeals did not reach those issues, however, because it held that Petitioners had not suffered a constitutional violation. (A-3.) As a result, even assuming purely for the sake of argument that this Court grants the Petition *and* rules in Petitioners' favor, the rulings below which denied Petitioners any measure of relief (and which were not encompassed within Petitioners' Questions Presented) indicate that Petitioners have little hope of achieving anything other than a hollow ruling. Because a decision by this Court would have little, if any, impact on Petitioners' rights, this case is inappropriate for review.

III.

THE COURT OF APPEALS CORRECTLY APPLIED STRICT SCRUTINY IN THIS CASE AND REACHED THE CORRECT RESULT.

In a strained effort to interest this Court in granting the writ, Petitioners contend that the Seventh Circuit failed to adhere to the strict scrutiny standard and applied its own, less stringent legal test.[7] Petitioners' suggestion that the Seventh Circuit abandoned strict scrutiny is demonstrably incorrect. The Seventh Circuit not only cited, but faithfully applied this Court's strict scrutiny test, emphasizing "the skeptical, questioning, beady-eyed scrutiny that the law requires when public officials use race" in making decisions. (A-4.) It is simply wrong for Petitioners to suggest that the Seventh Circuit would affirmatively state that Respondents' conduct in this case "is subject to the test of strict scrutiny," (A-4), and then, in the following paragraph, apply a different test. The language on which Petitioners rely merely reflects the Seventh Circuit's attempts to explain — not change — the meaning of the terms "compelling state interest" and "narrowly tailored." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J. concurring). Indeed, the Seventh Circuit's faithfulness to the strict scrutiny standard is aptly captured in the Court's observation that to justify the use of race in this case, Respondents were required to "show that they had

---

[7] According to Petitioners, "the Court of Appeals set forth new standards for governing race discrimination: 'a truly powerful and worthy concern' and that the racial measure taken is 'a plainly apt response to that concern.' Petitioners submit this is a far cry from the narrowly tailored remedy to deal with prior race discrimination." (Petition at 18-19.)

to do something and had no alternative to what they did." (A-4.)

The Court of Appeals faithfully applied the strict scrutiny analysis to the action taken by Respondents and properly concluded that Respondents' conduct survived this "questioning, beady-eyed scrutiny." (A-4.) Although Petitioners argue that there were alternatives to including a single African-American male on the supervisory staff, (*see* Petition at 19), the Seventh Circuit correctly found that Petitioners did not present any testimony or other evidence that challenged the belief that the promotion in question was "essential." (A-8.) One can hardly imagine a more narrowly tailored action than a prison warden promoting *one* African-American employee in an attempt to create and maintain a safe and secure correctional facility. Content to "lose on the issue of liability" once the Court of Appeals rejected their principal legal contentions (A-9), Petitioners' second-guessing of Respondents' well-supported professional judgment does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, Respondents request that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

James E. Ryan
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601
(312) 814-3312

Jeffrey D. Colman
Counsel of Record
Edward J. Lewis II
Special Assistant
Attorneys General
David A. Schwartz
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Attorneys for Respondents

December 27, 1996